Supreme Court, U.S.
FILED

011517 APR 10 2002

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No. 01-___

In The

Supreme Court of the United States

JOSEPH M. POPOVICH,

Petitioner,

v.

CUYAHOGA COUNTY COURT OF COMMON PLEAS, DOMESTIC RELATIONS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a state waive its Eleventh Amendment immunity from suit by its affirmative litigation conduct when it enters an appearance in an action, defends on the merits for several years, seeks a judgment on the merits, and fails to raise the issue of Eleventh Amendment immunity in the district court or in its original brief on appeal?

2. Did Congress exceed its authority granted to it by Section 5 of the Fourteenth Amendment when it enacted Title II of the Americans with Disabilities Act and in so doing abrogated the state's immunity from suit?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, the County of Cuyahoga, the Honorable Judge Anthony Russo and the Honorable Judge Timothy M. Flanagan in their official capacity were also Defendants in the proceeding below. The judges in their official capacity were dismissed at the time of trial without prejudice. The County of Cuyahoga was granted judgment as a matter of law post-trial. The appeal relating to the County of Cuyahoga was abandoned at oral argument.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Joseph M. Popovich, respectfully prays that a writ of certiorari issue to review the January 10, 2002 Opinion and Judgment of the *en banc* panel of the United States Court of Appeals for the Sixth Circuit and the prior panel decision rendered September 18, 2000, with respect to the issue of state waiver of Eleventh Amendment immunity from suit.

OPINIONS BELOW

The opinions and judgments of the United States Court of Appeals for the Sixth Circuit, *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division*, Nos. 98-4100/4540 is reported at 276 F.3d 808 (6th Cir. Jan. 10, 2002), and is reprinted at App. 1A. The panel decision of the Sixth Circuit Court of Appeals was reported at 227 F.3d 627, was vacated by the Court on grant of re-hearing on September 12, 2000 and reported at 2000 U.S. App. LEXIS 33978, and is reprinted at App. 51. The decision of the District Court is reprinted at App. 84.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinions and judgments of the U.S. Court of Appeals for the Sixth Circuit of January 10, 2001 and September 18, 2000, *vacated* by grant of re-hearing on December 12, 2000. The Supreme Court has jurisdiction to review cases from the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This petition questions whether a State waives its Eleventh Amendment immunity from suit when it litigates a case and seeks judgment on the merits in federal court without asserting the defense until after an adverse judgment is rendered. The Eleventh Amendment to the United States Constitution provides: "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." U.S. Const. amend. XI. Petitioner specifically alleged in his amended complaint that Congress had abrogated the Respondent's immunity from suit when it enacted Title II of the Americans with Disabilities Act (ADA). The Respondent defended the action on the merits, consented to the jurisdiction of the magistrate judge for trial, sought judgment as a matter of law at trial, filed post-trial motions seeking judgment on the merits, filed an appeal seeking judgment on the merits, and did not raise the issue of Eleventh Amendment immunity until the time at which it filed a Reply Brief in the Sixth Circuit Court of Appeals.

2. Additionally, this Petition questions whether Congress exceeded its authority granted by the Fourteenth Amendment of the United States Constitution by enacting Title II of the ADA and abrogating the states' immunity from suit under the Eleventh Amendment of the Constitution. Section 5 of the Fourteenth Amendment provides Congress with the "power to enforce, by appropriate legislation," the provisions of the amendment. Section 1 of the Fourteenth Amendment prohibits a state

from depriving "any person of life, liberty, or property without Due Process of law; deny[ing] to any person within its jurisdiction equal protection of the laws." In the present case, Petitioner was denied equal access to public services and was denied his constitutional right to Due Process in the context of his daughter's custody proceeding. These constitutional deprivations were the result of his disability, his request for accommodations, and his subsequent efforts to enforce his federally and constitutionally protected rights.

STATEMENTS

1. Petitioner, Joseph M. Popovich, is a citizen of the County of Cuyahoga, State of Ohio. Mr. Popovich was a Defendant in two domestic relations proceedings in the Cuyahoga County Court of Common Pleas, Domestic Relations Division. Aggrieved by the conduct of the Court in failing to provide a reasonable accommodation to his hearing disability, Mr. Popovich filed a charge of discrimination with the Department of Justice. Thereafter, upon insistence by Mr. Popovich that an accommodation be provided, and upon learning that a charge of discrimination had been filed with the Department of Justice, the Court stayed his case pending an investigation by the Department of Justice. The stay was not the result of a court order, but rather arose as the result of a refusal to rule on pending motions, schedule hearings or to move the case forward. As a result of the *de facto* stay of proceedings, Mr. Popovich was denied his constitutional right to equal protection and Due Process and was prohibited by court order from seeing his daughter for a

period of three years under the terms of a Temporary Protective Order.

2. On March 23, 1995, Mr. Popovich filed a Complaint for prospective Injunctive Relief to prohibit the Domestic Relations Court, Cuyahoga County and the presiding judge from discriminating against him on the basis of his disability and to prohibit the court from retaliating against him for further engaging in protected activity. Defendants filed an Answer on June 12, 1995. On September 15, 1995, an Amended Complaint was filed by Plaintiff, asserting for the first time a claim for damages. Plaintiff asserted that Defendants could be held liable for damages by virtue of Congress' express abrogation of immunity set forth in 42 U.S.C. Section 12202. Defendants filed their Answer on October 24, 1995 and denied for "lack of knowledge or information sufficient to form a belief" as to the truth of the allegation relating to immunity.

3. Defendants consented to the jurisdiction of the Magistrate Judge on January 13, 1998.

4. A jury trial commenced on March 30, 1998 and continued thereafter until a verdict in favor of Plaintiff for $400,000 was rendered on April 6, 1998. In reaching its verdict, the jury concluded that Defendants had intentionally discriminated against Plaintiff. At trial, the Magistrate Judge denied repeated requests for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure.

5. On April 23, 1998, Defendants filed a Motion for New Trial and for Judgment as a Matter of Law, and Remittur. Defendants did not raise the Eleventh Amendment immunity in the District Court. On November 19, 1998, the District Court issued a Memorandum of Opinion and

Order denying Defendants' motion for a new trial and granting, in part and denying, in part, Defendants' Motion for Judgment as a Matter of Law. (See Appendix App. 84)

6. On appeal, Defendants raised a number of assignments of error, yet failed to raise the issue of Eleventh Amendment immunity. Plaintiff responded to each assignment of error raised.

7. In its Reply Brief on appeal, Defendants made passing reference to the fact that the Eleventh Amendment may bar Plaintiff's claims.

8. Following oral argument before the Sixth Circuit Court of Appeals, the panel requested letter briefs addressing whether Congress exceeded its authority under the Fourteenth Amendment by enacting Title II of the ADA and abrogating the States' immunity from suit, and whether Defendants could avail themselves of a defense premised on Eleventh Amendment immunity. On September 18, 2001, the panel issued a decision concluding that Eleventh Amendment immunity was jurisdictional and could not be waived. (*Popovich I*, at App. 51) Additionally, the panel concluded that Congress exceeded its authority in enacting Title II of the Americans with Disabilities Act and abrogating the States' Immunity.

9. On December 12, 2000, the Sixth Circuit vacated the decision and granted a re-hearing *en banc* of the issues decided by the panel decision. Although Plaintiff sought a review of the waiver determination, on January 10, 2002, the Sixth Circuit issued its *en banc* decision which

failed to address the waiver issue[1] and concluded that Title II was valid as applied on Due Process grounds, but also that Congress had exceeded its authority to the extent that they it sought to enforce the Equal Protection Clause. (*Popovich II* at App. 51)

REASONS FOR GRANTING THE PETITION

I. COURTS ARE DIVIDED ON WHETHER A STATE WAIVES ITS ELEVENTH AMENDMENT IMMUNITY THROUGH ITS LITIGATION CONDUCT.

This petition invites the Court to settle an issue of Eleventh Amendment jurisprudence that has resulted in starkly contrasting decisions from the various Circuit Courts of Appeals. At issue is whether a State's affirmative litigation conduct in appearing in federal court, litigating a claim on the merits, and, in so doing, failing to raise the Eleventh Amendment immunity defense, acts as a waiver of this defense. The Court's resolution of this issue will provide needed guidance on whether, or to what extent, the states can accept a federal forum for disposition of claims under federal law and then raise the Eleventh Amendment immunity defense when they

[1] The Majority opinion observed that Defendant had waived the immunity argument by not raising it at the trial level and subsequently in its original brief to the Court of Appeals. *Popovich II*. See n.8. Despite this statement, the Court then addressed the validity of Congress' abrogation of the states' immunity from suit and remanded the matter for a new trial. Thus, the majority opinion suggested there had been a waiver but treated the issue as if it had not been waived.

become dissatisfied with the resolution of the case on the merits in federal court.

This case involves a similar, yet distinct issue from the issue addressed by this Court in *Lapides v. Board of Regents at the University System of Georgia*, Case No. 01-298 (Oral Argument heard on February 25, 2002). In *Lapides*, the issue presented to this Court involved the affirmative litigation conduct of causing removal from state court to federal court. In *Lapides*, the State of Georgia specifically invoked the federal court's jurisdiction by removing the Plaintiff's claims. The Circuit Court ultimately concluded that the removal did not constitute a waiver because the Georgia Constitution did not grant the Georgia Attorney General the authority to waive the Eleventh Amendment immunity. The Eleventh Circuit relied, in part, upon this Court's holding in *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945), in affirming the availability of the Eleventh Amendment immunity defense and remanded *Lapides* to the District Court to hear the non-barred claims.

As the present case does not involve the affirmative conduct of removal to federal court, but rather litigation conduct manifesting Respondent's acceptance of the federal court jurisdiction and the waiver of the immunity defense, the argument opposing waiver is premised upon this Court's opinion in *Edelman v. Jordan*, 415 U.S. 651 (1974). Essentially, the divide which has arisen in the circuit courts concerns whether the Eleventh Amendment is a bar to the subject matter jurisdiction of the federal court.

In this case, Respondent only first raised the Eleventh Amendment as a bar after: (1) a jury returned a

verdict in the amount of $400,000; (2) the Federal Magistrate Judge had denied its motion for judgment as a matter of law and/or for new trial; and (3) Petitioner had addressed Respondent's assignments of error based upon the merits of the case. In the panel decision, the Sixth Circuit side-stepped the issue of waiver of the Eleventh Amendment by characterizing the issue of waiver as a challenge to the appellate court's jurisdiction to consider the issue. In so doing, the court stated "there is authority in this circuit holding that we must consider Eleventh Amendment immunity *sua sponte*." Citing *Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996), as amended by 107 F.3d 358, 358-59 (6th Cir. 1997). The *Wilson-Jones* case was decided before the Supreme Court's decision in the *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998). Though given the opportunity, the panel declined Justice Kennedy's invitation in his concurring opinion in *Schacht* to establish a "rule of waiver" on the basis of litigation conduct by State actors. *Schacht*, 524 U.S. at 395. Further, the panel rejected the rationale of the First and Ninth Circuit, which independently concluded that Eleventh Amendment immunity from suit may be waived if not raised at the onset of the proceedings. See *Hill v. Blind Industries & Service of Maryland*, 179 F.3d 754, 756-58 (9th Cir. 1999) as amended by 201 F.3d 1186 (9th Cir. 2000); *Torres v. Puerto Rican Tourism Co.*, 175 F.3d 1, 5 (1st Cir. 1999).

This obvious split amongst the circuit courts is reflected in this Court's own divergent Eleventh Amendment jurisprudence. As this Court has previously observed, a state's immunity from suit in federal court under the Eleventh Amendment is "a personal privilege which it may waive at pleasure." *Clark v. Barnard*, 108

U.S. 436, 447 (1883). The state may waive its immunity from suit by voluntarily invoking a federal court's jurisdiction such as by removal, or through voluntary litigation conduct. *College Saving Bank v. Florida Prepaid Secondary Education Expense Board*, 527 U.S. 666, 675-676, 681 n.3 (1999).

In *Clark v. Barnard*, the Court concluded that a state's intervention as a Defendant in order to assert a claim to monies sought as damages by a Plaintiff constituted a waiver of the Eleventh Amendment immunity from suit. In that regard, this Court observed that the state had "appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination." *Clark*, 108 U.S. 447-448.

The rule in *Clark* was later endorsed in *Gunter v. Atlantic Coast Line*, 200 U.S. 273 (1906) ("When the state voluntarily [becomes] a party to a cause and submit[s] its right for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.") Thereafter, in *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916), this Court extended *Gunter* and concluded that the conduct of the state in answering the complaint, agreeing to a trial date and thereafter raising the immunity defense eight months after the Complaint was filed resulted in a waiver of the immunity defense. *Id.* at 47.

Conversely, citing *Ford Motor*, this Court has on numerous occasions held that immunity "need not be raised in the trial court." *Edelman*, 415 U.S. at 678 (Court affirmed Circuit Court's decision to address the issue on appeal). This principle has been reiterated in *dicta* of this

Court on several more recent occasions. See, *e.g.*, *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 529 (1982) (immunity may be raised "for the first time on appeal" though Court declined to address the issue and the State had not yet answered); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 n.8 (1984) ("deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding").

However, the assertion that Eleventh Amendment immunity is a bar to subject matter jurisdiction in federal court has most recently been rejected in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515-16 n.19, and most recently in *Schacht*. In *Schacht*, this Court opined that the Eleventh Amendment immunity does not act as a bar to a federal court's original jurisdiction, but rather grants the States the "legal power to assert a sovereign immunity defense should it choose to do so." *Schacht*, 524 U.S. at 389. See also *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) ("enacts a sovereign immunity from suit, rather than a non-waivable limit on the Federal Judiciary's subject-matter jurisdiction.").

In *Wisconsin Department of Correction v. Schacht*, 524 U.S. 381 (1998), Justice Kennedy, in his concurring opinion, detailed the confusion surrounding this Court's Eleventh Amendment jurisprudence. Justice Kennedy advocated a modification of the Court's Eleventh Amendment jurisprudence to make it more consistent with the Court's practice "regarding personal jurisdiction." *Schacht*, 524 U.S. 395. In his opinion, Justice Kennedy observed:

> I have my doubts about the propriety of this rule [permitting the state to assert the defense for the first time on appeal]. In permitting the

> belated assertion of the Eleventh Amendment bar, we allow states to proceed to judgment without facing any real risks or adverse consequences . . . [I]f the state were to lose . . . it could void the entire judgment simply by asserting its immunity on appeal.

Just such a "belated assertion" of Eleventh Amendment immunity from suit was made by Respondent in this case. Respondent attempted to void an otherwise valid judgment by asserting for the first time, as a defense, Eleventh Amendment immunity from suit well into the appeals process. After having litigated the case on the merits, it is inconsistent for Respondent to now claim an immunity which was present, to the extent it exists at all, from the inception of this litigation.

Embracing Justice Kennedy's call to establish a rule of waiver, the First and Ninth Circuits have concluded that litigating a case on its merit may result in a waiver of the Eleventh Amendment immunity defense. In *Hill v. Blind Industries & Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), the Ninth Circuit cogently explained the rationale for establishing a rule of waiver as follows:

> We see no valid reason why a party should belatedly be permitted to assert Eleventh Amendment immunity. The party knows whether it purports to be an "arm of the state," and is capable of disclosing early in the proceedings whether it objects to having the matter heard in Federal Court. Timely disclosure provides fair warning to the Plaintiff, who can amend the Complaint, dismiss the action and file it in State Court, or request prompt ruling on the Eleventh Amendment defense before the parties and the Court have invested substantial

> resources in the case. Timely disclosure also facilitates discovery, when appropriate, and allows the parties to establish a full record for appellate review. Requiring the prompt assertion of an Eleventh Amendment defense also minimizes the opportunity for improper manipulation of the judicial process.

Hill, 179 F.3d 757-758. In the *Hill* case, the State first raised and immunity defense after litigating the case upon the merits, but prior to the commencement of trial.

Similarly, in *Torres v. Puerto Rican Tourism Co.*, 175 F.3d 1 (1st Cir. 1999), the defendant failed to raise the immunity as a defense in its Answer. Defendant raised it belatedly in a dispositive motion and, on appeal, did not address the issue until its Reply Brief. The Court held that Defendants had not waived its Eleventh Amendment immunity, but rather, it had waived the right to argue that Congress had exceeded its Section 5 power when it enacted the ADA, *Torres*, 175 F.3d at 5-6. The Court did not expressly acknowledge *Schacht*, but rather found support for its deferral on the constitutional issue in this Court's decision in *Pennsylvania Department of Correction v. Yeskey*, 524 U.S. 206 (1998), wherein this Court declined to address the constitutionality of Title II of the ADA.

Like the First and Ninth Circuit, the Eighth Circuit has held that such litigation conduct as entering an appearance and defending on the merits results in a waiver of the immunity defense. *In re SDDS, Inc. v. State of South Dakota*, 225 F.3d 970 (8th Cir. 2000) (citing *Schacht* and concluding that States conduct in "actively and vigorously litigat[ing] the merits" constitutes a waiver of the defense), citing *Hankins v. Finnel*, 964 F.2d 853, 856 (8th

Cir.), cert. denied, 506 U.S. 1013, 121 L. Ed. 2d 566, 113 S. Ct. 635 (1992).

Contrasted with the analysis of the First, Eighth and Ninth Circuits, the Tenth Circuit, like the Sixth Circuit, has concluded that the late assertion of immunity may be considered by a court in its discretion. *Cisneros v. Wilson*, 226 F.3d 1113 (10th Cir. 2000). In *Cisneros*, the Tenth Circuit cited *Ford Motor* for the proposition that the Eleventh Amendment " 'declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court.' " *Cisneros*, 226 F.3d at 1117, citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. at 467.

Upon a careful analysis of those cases which have found waiver and those which have not, a common thread can be found. Courts have uniformly endorsed the use of Eleventh Amendment immunity as a shield, rather than as a sword. For example, in *Hill*, the Defendant upon being sued in federal court for fraud and breach of contract filed a motion to dismiss for lack of personal jurisdiction which was denied. The Defendant then filed a motion to dismiss based upon the amount in controversy. This also was denied. The Defendant then filed an Answer, consented to the Magistrate Jurisdiction, filed various discovery motions, filed trial materials including but not limited to jury instructions, witness and exhibit lists, and trial memorandum and participated in pretrial conferences. On the opening day of trial, the Defendant asserted for the first time that it was an arm of the State and was protected by the Eleventh Amendment Immunity. The Court found that the Defendant's conduct

"undermine[d] the integrity of the judicial system" and, accordingly, found that the defense had been waived. *Hill*, 179 F.3d at p.756.

Petitioner herein was prejudiced by the Respondent's belated assertion of the Eleventh Amendment immunity defense. Petitioner dismissed Defendant Timothy Flanagan, the presiding judge in the underlying domestic relations case, at the request of the Respondent on the first day of trial. In so doing, Petitioner forfeited his pending Section 1983 claim as well as any argument for extension of the *ex parte Young* doctrine and injunctive relief. Obviously, this action would not have been taken but for Respondent's failure to timely raise a challenge under the Eleventh Amendment. Further, Petitioner could have pursued, through discovery, evidence of Federal funding to support a claim under the Federal Rehabilitation Act which independently may have established the existence of a duty to accommodate and the damages awarded by the jury.

Petitioner submits that the issues raised herein are ripe for consideration by this Court. The Court has accepted and heard the argument in *Lapides* addressing whether removal to federal court constitutes a waiver of the Eleventh Amendment defense. If the Court's determination in *Lapides* is instructive on these issues, then granting of the Petition and remanding the matter for further consideration of the waiver issue based upon the holding in *Lapides* would be appropriate.

However, Petitioner further submits that this case also clearly warrants consideration of the nature of the Eleventh Amendment immunity defense in the context of Respondent's litigation conduct of defending upon the

merits without raising the immunity defense. It is time for this Court to establish a rule governing waiver through state litigation conduct, and resolve once and for all the contours of the Eleventh Amendment bar for practitioners throughout the federal court system. This case squarely presents the question of whether litigating a case on its merits, which results in an adverse judgment, is a waiver of this defense.

II. COURTS ARE DIVIDED ON WHETHER CONGRESS EXCEEDED ITS AUTHORITY IN ABROGATING THE STATES' ELEVENTH AMENDMENT IMMUNITY UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

This petition further invites the Court to settle the issue of whether the abrogation of the States' Eleventh Amendment immunity under Title II of The Americans with Disability Act is a valid exercise of congressional authority. Since this Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Circuit Courts have been sharply divided on the question of whether states may be sued for money damages in federal court for violation of the mandates of Title II of The Americans with Disabilities Act. In *Garrett*, this Court reversed a decision of the Eleventh Circuit Court of Appeals and concluded that Title I of The Americans with Disabilities Act was not a valid exercise of congressional authority under Section 5 of the Fourteenth Amendment and thus, the Eleventh Amendment bars suits for damages by employees of the state. *Garrett*, 531 U.S. 356, 121 S. Ct. 255, 148 L. Ed. 2d 866 (2001). In *Garrett*, the Court declined to decide "the constitutional issue whether Title II, which has somewhat different remedial provisions

from Title I, is appropriate legislation under Section 5 of the Fourteenth Amendment . . . " *Garrett*, 121 S. Ct. 960.

Subsequent to *Garrett*, the Circuit Courts have been sharply divided on the issue and have reached no less than four different results as to the validity of Title II. In reaching its conclusion in the instant case, the Sixth Circuit emphasized the microcosm of Title II litigation. In this regard the majority opinion joined by seven of the thirteen judges concluded without significant discussion that "congressional authority under Section 5 to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to the Eleventh Amendment state immunity." *Popovich II* at App. 7. Without analyzing the distinction between Title I and Title II noted in the *Garrett* decision, the Sixth Circuit adopted the *Garrett* holding and applied it to Title II, to the extent that it purports to enforce the Equal Protection Clause.[2] Thus, the Court concluded that, on Equal Protection grounds, Congress exceeded its Section 5 authority by abrogating the State's Eleventh Amendment Immunity. Conversely, the Court concluded that Title II appropriately enforces the Due Process Clause.

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[2] Missing from the Sixth Circuit's Equal Protection analysis is any discussion of the legislative history relating to unconstitutional discrimination by states in the provision of public services. The *Garrett* Court noted that although "[o]nly a small fraction" of the examples in Appendix C to Justice Breyer's dissent related to State discrimination against people with disabilities in employment, "[t]he overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Id.* at 966 n.7

Five of the seven judges who joined in the majority opinion would have concluded that Title II is a valid exercise of congressional authority under Section 5 of the Fourteenth Amendment to remedy violations of both the Due Process and Equal Protection Clauses. See *Popovich II*, at App. 19-26. Six of the thirteen judges concluded that Title II exceeded Congress' Section 5 authority under the Fourteenth Amendment to abrogate the states' immunity. See *Popovich, II*, Ryan concurring in part, dissenting in part. App. 26-45. The split amongst thirteen judges of the Sixth Circuit could not more clearly define the dispute which exists among the federal circuits and which therefore requires this Court's resolution.

Though no Court of Appeals other than the Sixth Circuit has bifurcated its determination of the validity of Title II along Due Process and Equal Protection grounds, other Courts have joined the debate on whether *Garrett* affects the validity of Title II. In this regard, the Courts which have concluded that Congress exceeded its authority under Title II to abrogate the state's sovereign immunity have concluded that the legislative record does not provide sufficient support for a conclusion that states have unconstitutionally discriminated against individuals with disabilities. See *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001) (Most of the examples of arguably unconstitutional government discrimination against the disabled involved local, not state, government); *Thompson v. State of Colorado*, 278 F.3d 1020 (10th Cir. 2001) (Most "occurrences of [unconstitutional discrimination] involve local officials and not the state."

Conversely, the Ninth Circuit Court of Appeals has reaffirmed its holding in *Dare v. California*, 1981 F.3d 1167 (9th Cir. 1999), cert. denied, 529, U.S. 819 (2001). See

Wroncy v. Oregon Department of Transportation, case number 00-35356, 2001 U.S. App. Lexis 8761, unreported (9th Cir. 2001). In *Dare*, the Ninth Circuit concluded that "Congress made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face" and held that Congress had validly abrogated the states' sovereign immunity pursuant to its Section 5, Fourteenth Amendment power.

Likewise, the Second Circuit Court of Appeal concluded that Congress had validly abrogated the states' immunity in the Eleventh Amendment to the extent that a state may be held liable for money damages when the Plaintiff is able to "establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability." See *Garcia v. SUNY Health Science Center of Brooklyn*, 280 F.3d 98 (2nd Cir. 2001). In *Garcia*, the Second Circuit persuasively focused upon the "remedial provisions" of Title II and the issue of suits for money damages against the state. *Garcia*, 280 F.3d at 110-111. Title II is enforced under Title VI of the Civil Rights Act of 1964. *Id.* at 111. The Supreme Court has held repeatedly that compensatory damages under Title VI of the Civil Rights Act of 1964 may only be recovered where there is a finding of "intentional discrimination". *See Alexander v. Sandoval*, 532 U.S. 275 (2001), (declining to find compensatory damages recoverable for disparate impact cases under Section 601 of Title VI), citing *Guardian Association v. Civil Serv. Commission of New York*, 463 U.S. 582, 611 (1983); *See also, Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74-75 (1992) (Scalia concurring) (Title IX of the Education Amendments of 1972 patterned after Title VI, compensatory damages recoverable in cases of intentional discrimination); *accord, Ferguson v. City of Phoenix*, 157 F.3d 668

(9th Cir. 1998) (Title II and Section 504 of Rehabilitation Act require proof of intentional discrimination); *Bartlett v. New York State Bd. Of Bar Examiners*, 156 F.3d 321 (2d Cir. 1998), vacated on other grounds, 527 U.S. 1031, 144 L. Ed. 2d 790, 119 S. Ct. 2388 (1999).

In reliance upon the enforcement scheme under Title II which requires proof of intentional discrimination, the Second Circuit found that Congress did not exceed its authority under Section 5 of the Fourteenth Amendment. *Garcia*, 280 F.3d at 112.

Due to the confusion which has been generated following the *Garrett* decision with respect to Title II of the Americans with Disabilities Act, this issue is ripe for consideration by this Court. This Court should address whether Congress exceeded its authority in abrogating the states' immunity under the Eleventh Amendment under Title II of the Americans with Disabilities Act.

CONCLUSION

It is respectfully requested that this Court grant this petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH M. POPOVICH,	)	
Plaintiff-Appellee/ Cross-Appellant,	)	
v.	)	Nos. 98-4100/4540
CUYAHOGA COUNTY COURT OF COMMON PLEAS, Domestic Relations Division,	)	
Defendant-Appellant/ Cross-Appellee,	)	
CUYAHOGA COUNTY,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 95-00684 – James S. Gallas, Magistrate Judge.

Argued: June 6, 2001

Decided and Filed: January 10, 2002

Before: MARTIN, Chief Judge; MERRITT, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges

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COUNSEL

ARGUED: Bruce B. Elfvin, ELFVIN & BESSER, Cleveland, Ohio, for Appellants. Richard C. Haber, REMINGER & REMINGER CO., LPA, Cleveland, Ohio, for Appellee.

ON BRIEF: Bruce B. Elfvin, Barbara Kaye Besser, Amy S. Glesius, for Appellants. Richard C. Haber, Brian D. Sullivan, REMINGER & REMINGER CO., LPA, Cleveland, Ohio, for Appellee. Seth M. Galanter, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. Michael Kirkman, Sky Pettey, OHIO LEGAL RIGHT SERVICE, Columbus, Ohio, Stephen P. Carney, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, Richard N. Coglianese, OFFICE OF THE ATTORNEY GENERAL, EMPLOYMENT LAW SECTION, Columbus, Ohio, Mary M. Collier, ASSISTANT ATTORNEY GENERAL, Nashville, Tennessee, Michael E. Moore, TENNESSEE ATTORNEY GENERAL'S OFFICE, Nashville, Tennessee, for Amici Curiae.

MERRITT, J., delivered the opinion of the court, in which seven of the thirteen judges of the *en banc* court joined in Sections II and III and in the judgment of the court reversing the judgment of the district court and remanding for a new trial; namely, MARTIN, C.J., MERRITT, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN. Six Judges, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, and BATCHELDER, would reverse the judgment of the district court and dismiss the case. MARTIN, C.J., MERRITT, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, and BATCHELDER, JJ., concur in Section I of Judge MERRITT's opinion for the court. MOORE, J. (pp. 17-22), delivered a separate concurring opinion, in which DAUGHTREY, COLE, CLAY, and GILMAN, JJ., joined. RYAN, J. (pp. 23-38), delivered a separate opinion concurring in part and dissenting in part, in which BOGGS, NORRIS, SUHRHEINRICH, SILER, and BATCHELDER, JJ., joined. GILMAN, J. (pp. 39-43), delivered a separate opinion concurring in the judgment and dissenting from the composition of the *en banc* court.

OPINION

MERRITT, Circuit Judge. The state sovereign immunity provision of the Eleventh Amendment, ratified in 1795 to overrule *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), prohibits Congress from directing the federal courts to hear suits by citizens against a state or its executive, legislative or judicial departments.[1] On the other hand, the Fourteenth Amendment in Section 5, ratified 73 years later, partially abrogates this state immunity from suit in federal courts by giving Congress the "power to enforce [Section 1 of the Amendment] by appropriate legislation," including the creation of federal causes of action against states in federal court.[2] How

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[1] The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996), gives a brief history of its interpretation.

[2] The pertinent provisions of the Fourteenth Amendment are as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any

exactly to reconcile these two conflicting provisions has in recent years divided constitutional scholars, the federal courts, and the Supreme Court.[3] This appeal to the *en banc* court asks us to examine further the relationship between these two constitutional amendments. The case arises under *Title II* of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, which provides that "no qualified individual with a disability shall, by reason of such disability, *be excluded from participation* in or be denied the benefits of the *services, programs, or activities of a public entity,* or be subjected to discrimination by any such entity" (emphasis added). The statute does not define "excluded from participation" or "discrimination."

Here, a hearing-impaired person brought an action in federal court under Title II against a state court for allegedly failing to provide him with adequate hearing assistance in his child custody case. He obtained a jury verdict in the district court below against the state court for $400,000 in compensatory damages based on an equal protection-type claim of discrimination, a due process-type claim of unreasonable exclusion from participation

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person within its jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[3] Laurence H. Tribe, *American Constitutional Law* § 5-16 (3d ed. 2000); Evan H. Caminker, *Symposium: Shifting The Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: "Appropriate" Means-Ends Constraints on Section 5 Powers,* 53 Stan. L.Rev. 1127 (2001).

in the custody proceeding, and a claim of retaliation for filing an administrative complaint for failing to accommodate his disability. The state has asserted it is immune from this suit under the Eleventh Amendment. The questions before us are whether Congress in Title II of the Disabilities Act has validly abrogated the state court's Eleventh Amendment immunity from suit; and, if so, whether the plaintiff has a valid case under the Act. We conclude that the plaintiff's action is barred by the Eleventh Amendment in so far as the action relies on congressional enforcement of the Equal Protection Clause, but it is not barred in so far as it relies on congressional enforcement of the Due Process Clause. As applied to the plaintiff's cause of action, Title II is "appropriate legislation" under section 5 and the Due Process Clause of section 1 of the Fourteenth Amendment. We also conclude that, on the facts, the $400,000 verdict below must be set aside and the case remanded for a new trial under the Disabilities Act.

I. Enforcement of The Equal Protection Clause

The original three judge panel in this case agreed with the state's equal protection argument that it was immune from plaintiff's suit under the Eleventh Amendment, and the Court dismissed the suit without reaching the merits. Judge Ryan's opinion for the Court concluded that Congress had improperly expanded the Equal Protection Clause by imposing "heightened scrutiny" in disability cases when it only requires "rational basis" scrutiny. The Court said that "[i]t is well established that disability is not a suspect class for purposes of equal

protection analysis" and so "the State may discriminate on the basis of disability if such classification is rationally related to a legitimate state interest." *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Div.*, 227 F.3d 627, 637 (6th Cir. 2000). The panel did not reach any question concerning whether Congress had authority under the Due Process Clause to require accommodation of the disabled in state child custody proceedings.

On December 12, 2000, we elected to rehear this case *en banc*, but delayed consideration until the Supreme Court announced its decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, decided February 21, 2001. In June of 2001, the *en banc* court heard oral argument. In *Garrett*, the Supreme Court, 5 to 4, held that the Eleventh Amendment bars federal employment discrimination suits against a state based on disability, as authorized by *Title I* of the Americans with Disabilities Act. The Court, noting that the *Title I* legislation is limited to employment discrimination against the disabled, said that "the scope of the constitutional right at issue" is simply "equal protection." *Id.* at 963. Title I does not encompass claims based on substantive rights under the Due Process Clause, and therefore the scope of the constitutional right Congress is enforcing does not go beyond equal protection liability. The Court then held that Section 5 of the Fourteenth Amendment does not give Congress the power to enforce the Equal Protection Clause by authorizing federal employment discrimination suits against states based purely on *disability*. Like Judge Ryan's opinion for the panel in this case, the Court reasoned that under equal protection principles, disability – unlike race – is not a "suspect category"

and does not deserve "heightened scrutiny." Therefore, States may make reasonable employment decisions on the basis of disability. Title I of the Disabilities Act, which addresses discrimination in employment based on disability, may only trigger "minimum rational-basis review," *id.*, and Congress may not enforce the Equal Protection Clause by creating a higher standard of liability and enforcing it against the states in federal court. Sovereign immunity under the Eleventh Amendment forbids heightened state liability in federal courts in disability claims because such claims have never before received more constitutional protection than rational basis review. The Court held that Title I is not "congruent" with the Equal Protection Clause because it greatly expands "discrimination" liability by adding a very large new suspect class of plaintiffs. *Id.* at 967-68. Thus the Supreme Court followed the same line of reasoning constraining congressional enforcement of the Equal Protection Clause as the panel of this Court suggested in its opinion in this case. It is clear after *Garrett* that congressional authority under section 5 to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state immunity.[4]

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[4] Judge Moore, who concurs in our opinion on due process but not equal protection, states quite clearly in her concurring opinion the problem with upholding Title II on equal protection grounds:

> I recognize that a subset of discriminatory state action may be rational under the Constitution but unreasonable under Title II. In other words, Title II may 'prohibit conduct which is not itself unconstitutional and intrude into legislative spheres

II. Title II Appropriately Enforces The Due Process Clause

The Supreme Court indicated, however, that *Title II* of the Disabilities Act is different from Title I. Although the Court had granted certiorari to consider the appropriateness of Title II as an exception to Eleventh Amendment

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> of autonomy previously reserved to the states.' *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) . . .
>
> But Judge Moore then concludes:
>
> However, this possibility does not necessarily mean that Title II exceeds Congress's enforcement power under Section 5 of the Fourteenth Amendment. The Supreme Court has instructed that Congress may enact 'reasonably prophylactic legislation' when faced with 'difficult and intractable problems[, which] often require powerful remedies.' *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). In enacting the ADA, Congress noted that discrimination against individuals with disabilities was 'a serious and pervasive problem,' 42 U.S.C. § 12101(a)(2).

Judge Moore's position applies to Title II the reasoning of Justice Breyer's dissenting opinion in *Garrett*. But the problem in following this line of argument is that the majority of the Supreme Court in *Garrett* seems to have rejected this position in rejecting Justice Breyer's dissenting viewpoint. Rather, the majority of the Supreme Court appears to have established a clear rule that disability discrimination deserves only rational basis review and that Congress may not go beyond this standard under the Equal Protection Clause by imposing new liabilities on the states. This *Garrett* rule would appear to apply to both Title I and Title II, although the Court has not made this holding explicit as to Title II, and it is possible, though unlikely, that a majority of the Supreme Court might distinguish *Garrett* along the lines Judge Moore proposes in her concurring opinion.

immunity, the majority in *Garrett* reserved judgment on the validity of Title II under Section 5. It concluded that Title II, dealing with "services, programs, or activities of a public entity," rather than employment, "has somewhat different remedial provisions from Title I" and is not controlled by the Court's decision restricting equal protection claims against states. *Id.* at 960 n.1. Title II, unlike Title I, encompasses various due process-type claims with varying standards of liability and is not limited to equal protection claims. In addition to briefly noting differences between the two titles, the Court in *Garrett* also noted that Section 5 allows Congress to prohibit a "broader swath of conduct" than the courts have themselves identified as unconstitutional. *Id.* at 963.

In *Garrett*, the Supreme Court advised the lower federal courts that "the first step" in reconciling the Eleventh Amendment with legislation adopted under Section 5 is "to identify with some precision the scope of the constitutional right at issue" that Congress is "enforcing," and to define the "metes and bounds" of that particular right." *Id.* at 963-64. Obviously, standards of constitutional liability differ depending on the nature of the constitutional right in question. In the case before us, the essential constitutional right sounds most clearly not in equal protection but in due process. The general claim is that the state court in a child custody proceeding denied the partially deaf plaintiff a reasonable way to participate meaningfully in the proceeding so that he could assert his child custody rights. He was, he claims, "excluded from participation in" the proceeding – to use the precise words of Title II. In defining the "metes and bounds" of the constitutional right before us, we must consider

whether plaintiff's due process-type claim to participate fully in the hearing in his child custody suit is an exception to Eleventh Amendment immunity.

The Supreme Court has recognized the special nature of parental rights and has consequently imposed special due process guarantees so that states may not lightly terminate parents' relationships with their children. The procedural guarantees that the Court has previously had an occasion to discuss include the requirements that states provide indigent parents with court-appointed counsel during certain parental rights hearings, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 30 (1981) (noting that courts have "generally held that the State must appoint counsel for indigent parents at termination proceedings"); utilize a "clear and convincing" evidentiary standard when considering the termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982); and provide indigent parents, free of charge, with the trial records necessary for proper consideration of appeals challenging termination of their parental authority, *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996). *Cf. Little v. Streater*, 452 U.S. 1 (1981) (striking down Connecticut's requirement that indigent defendants bear the cost of paternity tests if taken at the indigent's request). In fact, although the Court has issued a number of divided opinions in deciding these questions, it has unanimously agreed that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Santosky*, 455 U.S. at 774 (Rehnquist, J., dissenting).

In *Lassiter,* the Court said that state termination or alteration of parental rights requires procedural safeguards under the Due Process Clause in order to insure "the accuracy and [justice] of the decision," 452 U.S. at 27, and in order to avoid "the risk that a parent will be erroneously deprived of his or her child." *Id.* at 28. Thus the appointment of counsel for indigent parents may be required in complex judicial proceedings that may include the need for "[e]xpert medical and psychiatric testimony, which few parents are equipped to understand." *Id.* at 30. *Lassiter* makes it clear that in analyzing the safeguards needed in child custody proceedings, the Due Process Clause requires a balancing of "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27. This broad balancing standard under due process – unlike the flat rule giving only rational basis analysis under equal protection in disability matters – is open to interpretation by Congress as well as the courts, for otherwise the Court's admonition in *Garrett* that Congress may seek to deter a "broader swath of conduct than the courts have themselves identified as unconstitutional" would have no real meaning or effect. Otherwise the "congruence" required between a piece of Section 5 legislation and the specific constitutional provision enforced by the legislation would mean that Congress may only provide remedies to enforce a specific court decision. This would effectively usurp congressional authority to pass "appropriate" legislation and would give less deference to Congress than courts ordinarily give to administrative agencies in interpreting statutes.

The institutional role of Congress under Section 5 in interpreting the Fourteenth Amendment should be no less expansive than the role of the courts in interpreting statutes at common law. Congress should have at least the same power as Lord Coke described for judges in interpreting statutes in 1628:

> a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute provideth; and the reason hereof is, that for the lawmakers could not possibly set downe all cases in expresse terms.[5]

Judges must adjudicate one case at a time and usually do not go beyond the case at hand to anticipate or rule on other fact patterns that may fall "within the same mischiefe." Law making for future cases with different fact patterns is usually the role of the legislator, not the role of courts in a single decision on a single set of facts after a courtroom battle by adversaries. Therefore, the courts should not tie the hands of Congress under Section 5 merely to the implementation of previous court decisions. Congress should have under Section 5 at least the power that common law judges possess to enforce "the equity of the statute," as described by Lord Coke.[6]

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[5] Sir Edward Coke, The First Part of the Institutes of the Laws of England § 21, at 24.b (Philadelphia, Robert H Small 1853) (1628).

[6] *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV.1 (2001); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001).

Here the plaintiff's due process interest is significant in that the judicial proceeding will determine the amount of time, if any, he can spend with his daughter. Failure to accommodate his hearing disability may render him unable to participate meaningfully in that determination. If he cannot understand what is happening during the custody hearing, it will be impossible for him to refute claims made against him, or to offer evidence on his own behalf. Consequently, a state's failure to accommodate plaintiff's deafness may greatly increase the risk of error in the proceeding, precluding one side from responding to charges made by the opposing party, an essential element of our adversary system. From Ohio's perspective, the paramount governmental interest is to insure that the State's most vulnerable citizens are placed with the parent best suited for providing for their welfare. This interest is achieved through a proceeding that permits both parents to understand and to respond to the arguments made by their adversaries, thereby giving the judge a complete picture of each parent's abilities to care for the child in question. At the same time, Ohio has an obvious need to administer its decisions in a cost-conscious and time-effective manner, and at some point the requested accommodations may become so expensive or onerous as to outweigh their usefulness in reaching a decision.

In legislating on the subject of disability, Congress may require states in child custody proceedings to consider (1) the "vital" and "fundamental" nature of the rights at stake in parental custody hearings, *Santosky*, 455 U.S. at 753, (2) the fact that costs of supplying the requested accommodation are fairly low, and (3) that parties may be virtually "excluded from participation in"

the state proceeding unless adjustments are made to accommodate the party's disability. The subject matter involved in the instant case – a father seeking to force the state to provide him with hearing assistance for use in a state judicial proceeding determining his custody rights with respect to his daughter – raises obvious due process concerns which Congress has the authority to address under Section 5. Based on the Supreme Court cases concerning the process required in child custody suits, it is clear that Ohio is required to provide Popovich with some level of hearing assistance, depending on the degree of his disability, for his daughter's custody hearing and may not retaliate against him for making such a request. As applied to the case before us, the "participation" requirement of Title II serves to protect Popovich's due process right to a meaningful hearing. In child custody cases involving hearing-impaired parents, Congress is well within its express authority under Section 5 to require states to accommodate parental disability and to refrain from retaliation, for Congress is "enforcing" the due process right rather than "expanding" it. There is no separation of powers problem here, as in *Garrett*, where Congress, according to the view of the majority, failed to observe a clear rule of equal protection law. Congress has not changed the nature of the due process right or watered down the constitutional standard. The congressional "exclude from participation" standard, as applied here, certainly does not prohibit a "broader swath of [state judicial] conduct" than the Supreme Court suggests is within the congressional power under Section 5.

III. The Merits of Plaintiff's Claims under the Disabilities Act

This case, which resulted in a $400,000 damage award for plaintiff, was tried in the district court on three basic theories: (1) retaliation by the state domestic relations court against plaintiff for requesting hearing assistance and then filing an administrative complaint with the Department of Justice under the Disabilities Act in violation of 42 U.S.C. § 12203;[7] (2) exclusion from participation in the custody case because of plaintiff's disability; and (3) discrimination against plaintiff by denying him – in the language of the district court's jury charge – "an equal opportunity . . . to enjoy the benefits of a service conducted by the public entity [the state court]" and "the opportunity to participate equally in the proceeding pending before the court." *Popovich v. Cuyahoga County,*

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[7] 42 U.S.C. § 12203, Prohibition against retaliation and coercion under the ADA, states in relevant part:

> (a) Retaliation
>
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter, or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> (b) Interference, coercion, intimidation
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

No. 98-4100 (N.D. Ohio), charge to jury, April 3, 1998, trial transcript at 770.

We reverse and remand the case for a new trial because the charge to the jury appears to permit the jury to find in favor of the plaintiff if it finds discrimination against him or exclusion from public proceedings based on equal protection principles. After *Garrett,* this is an impermissible basis on which to base federal jurisdiction under the Eleventh Amendment or a verdict and damages against a state court under the Disabilities Act. *Garrett,* however, does not foreclose a trial and verdict based on retaliation or unreasonable exclusion from judicial proceedings based on disability in a due process-type claim. We believe that the facts presented in the court below raise jury issues on the retaliation and exclusion claims.

The trial in the district court that resulted in the $400,000 damage award consisted of ten witnesses presented over four days. Much of the testimony described plaintiff's custody dispute over his daughter and the initial *ex parte* hearing in August 1992 that led to a state court order transferring custody of his daughter to her mother. This testimony about the custody dispute and the initial *ex parte* hearing is relevant only to the extent that it provides the context or background in which the facts concerning retaliation and exclusion were presented. On the retaliation claim, Mr. Thomas Kondzer, plaintiff's lawyer during the custody dispute and hearings held in 1992, testified that his client was presented with an "option" in December of 1992 by the presiding judge of the custody proceeding that required plaintiff to either give up his rights under the Disabilities Act or suffer a

delay in the adjudication of the custody case. Testimony of Thomas Kondzer, Mar. 31, 1998, trial transcript at 173. Mr. Kondzer testified that the waiver "wasn't a waiver for that day. It was a total waiver." *Id.* at 243. According to Mr. Kondzer "the option was to withdraw the motion [for closed-captioning or real time transcription], waive your rights under the ADA and proceed today" or have the proceeding postponed. *Id.* With Mr. Kondzer's advice, the plaintiff refused to waive his Disabilities Act claim or withdraw his motion. After his refusal, the hearing was then discontinued and did not resume again until the fall of 1994, over a year and a half later. In fact, the parties stipulated in the court below that the judge presiding over the custody proceeding "gave the plaintiff two options. Plaintiff could withdraw his motion for a hearing accommodation and the court could proceed today, 'with the continued hearing' or [the judge] could, 'schedule a hearing to determine the extent of his hearing disability and what if any accommodation needed to be made for that'." Stipulated Facts of the Parties, Apr. 1, 1998, trial transcript at 390-91. The long delay in the proceedings then ensued.

At a pretrial conference held on February 2, 1995, the new judge assigned to the case presented plaintiff with a proposed stipulated order in which one of the provisions was that plaintiff would agree to waive any objection to or appeal of "this proceeding" and "any prior proceedings on the basis of Joseph Popovich's hearing disability." Def. Ex. B-5; Testimony of Judge Anthony Russo, Apr. 2, 1998, trial transcript at 439. Again, plaintiff, with the advice of his attorney, refused to sign the proposed order.

These facts raise a viable jury issue of retaliation. The jury, based upon these facts, would be entitled to find that forcing Popovich to choose between going forward with the custody hearings and waiving his disability claim – and then upon his refusal to waive, discontinuing the proceedings for a year and a half – could constitute retaliation in violation of § 12203.

These same facts concerning the long delay in the custody case based on plaintiff's refusal to waive his disability claims, plus the claimed refusal of the state court to provide plaintiff with closed captioned translation of the proceeding, or other forms of hearing assistance, may constitute an unreasonable exclusion of plaintiff from participation in the proceeding under principles of due process of law. The case may be retried on both theories of liability under the Disabilities Act.[8]

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[8] In response to Judge Ryan's dissenting opinion complaining that the *en banc* court should not reach the Due Process Clause theory for upholding Title II, we should point out that until the grant of *en banc* rehearing no party had a reasonable opportunity to advance this argument. In the District Court, no party advanced an Eleventh Amendment immunity argument barring this action, and therefore no party was called upon to advance any justification for Title II based on equal protection or due process under Section 5 of the Fourteenth Amendment. Before the original panel, the State as appellant advanced no argument based on the Eleventh Amendment in its original brief and only mentioned in its last reply brief. The State's immunity argument before the original panel was based only on an equal protection argument. The panel accepted the State's equal protection theory and dismissed plaintiff's action even though the State waived any such argument by not raising it in the trial court or in its original brief.

Once the Civil Rights Division of the Justice Department learned that Title II was under constitutional attack before the

Hence, the plaintiff's claims based on equal protection type principles of discrimination are foreclosed, as stated above, and the jury verdict of $400,000 is set aside and the case remanded for retrial on the retaliation and unreasonable exclusion from participation claims.

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring. I concur in the judgment of the court and Part II of the majority opinion, but I write separately with respect to Part I. The court relies on the Supreme Court's holding in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), that state employees may not recover

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original panel, it sought to intervene under 28 U.S.C. § 2403(a). Even though § 2403(a) grants the government a right to intervene when the constitutionality of a federal statute is attacked (the Court "shall permit the United States to intervene . . . for argument on the question of constitutionality"), the panel issued a one-line order denying intervention. Thus the panel prevented the government from making any argument and reached its conclusion in the absence of any argument based on the Due Process Clause. The *en banc* court allowed the government to intervene, and it then filed a brief raising the due process justification for upholding Title II in this case. Moreover, Mr. Michael Kirkman of the Ohio Legal Rights Service filed an extensive amicus brief supporting the government's due process justification for Title II. We therefore believe it appropriate to reach the due process basis for upholding Title II. It is not the fault of the *en banc* Court, or the government, that the original panel chose to ignore the Due Process Clause as a basis for Title II.

money damages for the state's failure to comply with Title I of the Americans with Disabilities Act ("ADA") to foreclose equal protection claims for money damages against the state under Title II of the ADA. I believe that *Garrett* does not control this court's disposition of this case. Moreover, I would conclude, based on the significant differences between Titles I and II, that Congress validly enacted the latter pursuant to its enforcement authority under § 5 of the Fourteenth Amendment to remedy or to prevent violations of both the Due Process and Equal Protection Clauses.

Although classifications based on disability are not subject to heightened scrutiny, the Supreme Court has recognized that the Equal Protection Clause prohibits arbitrary and invidious discrimination against individuals with disabilities. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (holding that "the [disabled], like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law"). As correctly noted in Part I of the majority opinion, the Supreme Court held in *Garrett* that Congress had exceeded its § 5 enforcement authority in abrogating state sovereign immunity from suits for money damages under Title I of the ADA. 531 U.S. at 374. In so holding, the *Garrett* Court observed that the legislative record of the ADA "fails to show that Congress did in fact identify a pattern of irrational state discrimination in *employment* against the disabled." *Id.* at 368 (emphasis added). However, the Court expressly reserved the question whether Title II of the ADA was appropriate legislation under § 5

of the Fourteenth Amendment. *Id.* at 360 n.1.[1] Because *Garrett* did not address whether Congress identified a history and pattern of unconstitutional discrimination by the states against persons with disabilities in *the provision of public services,* I would not read the decision to be determinative in the context of Title II.[2] Rather than rely on authority that is at best merely implied, I would analyze the constitutionality of Title II on its own merits.

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[1] Indeed, the *Garrett* Court acknowledged that "[t]he overwhelming majority of [the hundreds of accounts compiled by Justice Breyer in his dissent] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." 531 U.S. at 371 n.7.

[2] *Cf. Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn,* ___ F.3d ___, 2001 WL 1159970, at *9 (2d Cir. Sept. 26, 2001) (holding that Title II actions for money damages may be brought by plaintiffs who can "establish that the Title II violation was motivated by discriminatory animus or ill will based on the plaintiff's disability"); *see also Thompson v. Colorado,* 258 F.3d 1241, 1249, 1255 (10th Cir. 2001) (stating, post-*Garrett,* that "this court now writes on a clean slate in addressing whether Title II of the ADA is a valid abrogation of the states' Eleventh Amendment immunity" and holding that it is not).

I also find instructive the procedural history of *Dare v. California,* 191 F.3d 1167 (9th Cir. 1999), *cert. denied,* 525 U.S. 819 (2001), in which a divided panel of the Ninth Circuit noted that "Congress made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face" and held that Congress validly abrogated state sovereign immunity pursuant to its Fourteenth Amendment powers in enacting Title II of the ADA. *Id.* at 1175. The Supreme Court's denial of certiorari in *Dare* came a week after the Court announced *Garrett.*

In rejecting the equal protection claim in this case, the court discounts the significant differences between Titles I and II of the ADA. First, Congress made express findings, based on an extensive study and record,[3] of a pattern of unconstitutional discrimination by the states against individuals with disabilities in the areas covered by Title II.[4] These findings appear in the text of the statute itself, where Congress specifically noted that "discrimination against individuals with disabilities persists in such critical areas as . . . education . . . institutionalization . . . voting, and access to public services." 42 U.S.C. § 12101(a)(3). The findings also appear in the legislative history of Title II. H.R. REP. NO. 101-485, pt. 2, at 28-29 (1990); S. REP. NO. 101-116, at 6 (1989).[5]

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[3] Congress itself held no less than thirteen hearings; it also created the Task Force on the Rights and Empowerment of Americans with Disabilities ("Task Force"), which held sixty-three public forums in every state that were attended by thousands of people. *Garrett*, 531 U.S. at 377-78 (Breyer, J., dissenting). The Task Force eventually submitted "several thousand documents" that evidenced "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 STAFF OF HOUSE COMM. ON EDUC. AND LABOR, 101ST CONG., LEGISLATIVE HISTORY OF PUB. L. NO. 101-336: THE AMERICANS WITH DISABILITIES ACT 1324-25 (Comm. Print 1990) ("2 LEGIS. HIST.").

[4] In contrast, the *Garrett* Court emphasized that Congress had mentioned the private sector – but not the states – in its legislative findings about employment discrimination against persons with disabilities. 531 U.S. at 371-72.

[5] Furthermore, the caselaw contains some evidence of "extensive litigation and discussion of the constitutional violations," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), in

The fact that Title II implicates constitutional violations in areas ranging from education to voting also suggests that heightened judicial scrutiny under both the Due Process and Equal Protection Clauses is appropriate. Title II's general mandate covers all "of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. In this case, which involves the right of a hearing-impaired person to have adequate hearing assistance in a child custody proceeding, the court concludes that "the essential constitutional right sounds most clearly not in equal protection but in due process." Maj. op. at 8.

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the provision of public services to the disabled. *See, e.g., Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243, 1248 (6th Cir. 1989) (fifteen paraplegics received "deplorable treatment" at a county jail – they were not bathed for several days and forced to remain in their human waste), *cert. denied*, 495 U.S. 932 (1990); *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 158 (3d Cir. 1989) (city and state did not violate the Fourteenth Amendment in reducing or eliminating services to mentally retarded persons living at home); *LaFaut v. Smith*, 834 F.2d 389, 392-94 (4th Cir. 1987) (paraplegic inmate was denied adequate toilet facilities for three months and necessary physical therapy); *Gallagher v. Pontiac Sch. Dist.*, 807 F.2d 75, 78-79 (6th Cir. 1986) (schools did not violate the Fourteenth Amendment by failing to provide "*additional* special services" to a deaf and mentally handicapped student who was enrolled in special education programs); *Parrish v. Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted two paraplegic inmates with a knife, caused them to sit in their own feces, and taunted them with remarks like "crippled bastard"); *cf. Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1376 (10th Cir. 1981) (doctor alleged that state university excluded him from its Psychiatric Residency Program in violation of the Rehabilitation Act because he suffered from multiple sclerosis).

However, in finding widespread unconstitutional discrimination against persons with disabilities, Congress heard extensive testimony not only about the states' failure to make courtrooms accessible to all persons but also about the states' discrimination against the disabled in areas such as voting[6] and education,[7] which clearly implicate the Equal Protection Clause.

Finally, I believe, given the extensive record of constitutional violations in the states' provision of public services to persons with disabilities, that Title II is a more congruent and proportional remedy than Title I. Although Title II does require the states to take some affirmative steps to ensure that the disabled have access to governmental programs, it targets discrimination that is unreasonable. Title II requires reasonable modifications only when a disabled individual is otherwise eligible for a public service and the modifications would not fundamentally alter the nature of the service. The states therefore

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[6] *See, e.g.*, S. REP. No. 101-116, at 12 (citing testimony about state discrimination in making polling places accessible to the disabled and forcing votes by absentee ballot before candidates participated in key debates); 2 LEGIS. HIST. 1219-20 (the chairperson of the Rhode Island Governor's Commission on the Handicapped testified about impediments to a disabled individual's ability to register as a voter and to vote).

[7] *See, e.g.*, S. REP. No. 101-116, at 7 (finding illustrative the testimony of a paraplegic who "was promptly refused admission [to the local public school] because the principal ruled that [she] was a fire hazard" due to her wheelchair); 2 LEGIS. HIST. 1224 (a legally blind student at the State University of New York "had to drop a required theory course because [she] was unable to read the photo-reduced score of a Bach cantata").

maintain their discretion over the provision of public services so long as they do not arbitrarily discriminate against the disabled. I recognize that a subset of discriminatory state action may be rational under the Constitution but unreasonable under Title II. In other words, Title II may "prohibit[ ] conduct which is not itself unconstitutional and intrude[ ] into 'legislative spheres of autonomy previously reserved to the States.' " *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). However, this possibility does not necessarily mean that Title II exceeds Congress's enforcement power under § 5 of the Fourteenth Amendment. The Supreme Court has instructed that Congress may enact "reasonably prophylactic legislation" when faced with "[d]ifficult and intractable problems[, which] often require powerful remedies." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). In enacting the ADA, Congress noted that discrimination against individuals with disabilities was "a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). The record indicates that the states have discriminated against the disabled in many aspects of governmental operations and that they may continue to do so. Confronted with this record of unconstitutional treatment, I conclude that the accommodations that Title II requires are necessary to fulfill Congress's purpose "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

For the foregoing reasons, I would hold that the Eleventh Amendment does not bar Title II actions for

money damages against the states based on violations of the Equal Protection Clause.

CONCURRING IN PART, DISSENTING IN PART

RYAN, Circuit Judge, concurring in part, and dissenting in part. I concur entirely in the majority's conclusion that Congress did not validly abrogate the states' Eleventh Amendment immunity when, under Title II of the ADA, it attempted to enforce the Equal Protection Clause. But, as I shall explain, I strongly disagree that, in enacting Title II, Congress validly abrogated states' immunity from alleged due process violations of the kind plaintiff has brought. Just as Congress did not validly exercise its constitutional authority under § 5 of the Fourteenth Amendment when it sought, in Title II, to override states' Eleventh Amendment immunity from equal protection claims, it likewise failed to do so with respect to due process claims.

I.

Joseph M. Popovich filed a complaint in 1995 alleging that the Domestic Relations Division of the Cuyahoga County Court of Common Pleas (DRD) discriminated against him in violation of Title II of the Americans with

Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134. Popovich also argued that the DRD retaliated against him after he filed a discrimination charge against the court with the United States Department of Justice.

Popovich, who suffers from partial hearing loss, claimed that the DRD violated Title II when it refused to provide him with real-time captioning services during custody hearings concerning his daughter. He further claimed that the DRD's effort to accommodate him by providing an FM amplification system was not reasonable because the system's headphones had given him an ear infection. Popovich also complained of numerous procedural delays which caused the hearings to drag on over four years. The delays were caused by the combination of a temporary restraining order against Popovich on motion by his ex-wife, a referee's illness, motions regarding Popovich's hearing accommodation, and unexplained scheduling delays.

Following a jury trial, Popovich was awarded $400,000 in compensatory damages. The DRD filed post-trial motions, which, with one exception, were rejected. The DRD then appealed to this court.

In its appeal, the DRD advanced arguments based on judicial immunity and the insufficiency of the lower court's findings. Popovich responded to each of those arguments in turn. Only in the DRD's reply brief was the issue of its Eleventh Amendment immunity raised. In light of the obvious importance of the Eleventh Amendment issue and the split in circuit authority, the panelists thought this abbreviated, afterthought reference to the

Eleventh Amendment immunity defense was troublesome, particularly since the principle of state sovereignty that the Eleventh Amendment codifies directs us to consider carefully legislative actions that curb its protections. To assist our effort to reach an informed decision on the matter and provide the parties a fair hearing, we, the original panelists, directed the parties to submit letter briefs specifically addressing Eleventh Amendment immunity and the ADA. We did so after satisfying ourselves that it is well settled that Eleventh Amendment state sovereign immunity could properly be raised for the first time on appeal. *Popovich v. Cuyahoga County*, 227 F.3d 627, 631-33 (6th Cir. 2000).

The parties argued that Congress's abrogation of Eleventh Amendment immunity rested on congressional protection of the Fourteenth Amendment's equal protection principle. Neither party suggested that Congress acted to enforce any due process protection. In light of the argument before the court, and mindful that federal courts are forbidden to issue advisory opinions, U.S. Const. art. III, § 2, cl. 1; *see Morrison v. Olson*, 487 U.S. 654, 677 (1988), we rested our decision on the equal protection argument.

We held that equal protection was not a constitutionally sufficient basis on which to rest the ADA's abrogation of Eleventh Amendment immunity, reasoning that since government classifications involving disabled individuals receive rational review, the ADA prohibited a much broader swath of conduct than did the Fourteenth Amendment's Equal Protection Clause. The equal protection reasoning of our decision was ultimately approved and adopted by the Supreme Court in *Board of Trustees of*

the University of Alabama v. Garrett, 531 U.S. 356 (2001), in which the Court held that Congress did not validly abrogate states' Eleventh Amendment immunity when it passed Title I of the ADA.

Popovich moved for rehearing and a majority of this court's active members agreed to rehear the case *en banc*. In the interim, the Department of Justice intervened on behalf of Popovich and an *amicus* brief was submitted on his behalf by the Ohio Legal Rights Service (OLRS). Oddly, by the time the petition for rehearing *en banc* was granted, a new ADA theory was being advanced, not by Popovich, but by the *amicus* and the intervenor. Later, at the *en banc* hearing, some members of the court inquired of counsel concerning the novel and unbriefed "due process-type" theory, even though the parties had not argued it. As a result, much of the argument before the *en banc* court differed markedly from the equal protection theory the parties had briefed and argued before the original panel and had again briefed and attempted to argue before the *en banc* court. Nevertheless, at what surely will come as a surprise to the parties, the majority, unbidden, save for the urging of an *amicus* and an intervenor, finds that it is through enforcement of the Due Process Clause of the Fourteenth Amendment, and not, as the parties thought, the Equal Protection Clause, that Congress has successfully abrogated the states' Eleventh Amendment immunity.

II.

It is troubling, to put it mildly, that the strongest advocacy for the theory that the Due Process Clause of

the Fourteenth Amendment provides special protection for parents in custody or termination proceedings came from one of the members of the court at oral argument, not the parties, and has now become the basis for the court's judgment in this case.

Since the due process theory is a court-conjured rationale for denying Ohio Eleventh Amendment immunity, it is appropriate to ask whether the court should, upon *en banc* rehearing, address the due process theory of ADA abrogation at all. The members of the court are almost evenly divided on the critically important issue we are deciding: whether, in Title II, Congress has validly overridden the states' Eleventh Amendment immunity. The issue is novel. There is not a single appellate case on point in this circuit or elsewhere. Certainly, there is considerable interest in addressing the majority's novel due process issue, but, in my view, the proper case for doing that is one in which the issue is addressed and decided in the lower court – ours, after all, is a reviewing court – and then fully briefed and argued here. I object strongly to the majority's decision to invent for the plaintiff a theory of recovery he did not raise, brief, or argue, and to which the defendant has not had a suitable opportunity to respond.

This disapproval is not merely a matter of personal preference; it is, as I shall demonstrate, a position well supported by the appellate rules of practice and this court's precedent.

A.

1.

En banc proceedings are governed by Fed. R. App. P. 35, which states, in pertinent part:

> An en banc hearing or rehearing is *not favored* and ordinarily will not be ordered unless:
>
> **(1)** en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> **(2)** the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35(a) (emphasis added). This clear language cautions courts to exercise *en banc* review with circumspection. The Sixth Circuit has expounded further upon this rule:

> A suggestion for rehearing en banc is an *extraordinary procedure* which is intended to bring to the attention of the entire Court *a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Sixth Circuit precedent.*

6th Cir. R. 35(c) (emphasis added). In the matter before us there is *no* precedent-setting error and there is *no* conflict with prior precedent. Indeed, in *Garrett,* the Supreme Court affirmed the reasoning of this court's original panel. That should dispose conclusively of the matter. The only reason there is any uncertainty in this case is because at oral argument, one or two members of this court manufactured confusion. The equal protection theory of ADA abrogation – the argument advanced by Popovich – failed. That avenue of reversal foreclosed, the

majority gamely conducts an end-run around the precedent and advances its new theory based on due process. Granted, when deciding *Garrett* the Supreme Court left open the question of Title II and whether it abrogated Eleventh Amendment immunity, but that does not give license to lower courts to reframe appellate issues on rehearing in order to avoid results with which they personally disagree. The *en banc* panel's effort to create a dispute worthy of reconsideration renders the admonition in Fed. R. App. P. 35 a nullity. *En banc* panels should not create conflicts merely to allow the pronouncement of new law. If this body wishes to consider Eleventh Amendment abrogation by the ADA under a due process theory, undoubtedly it will soon have that opportunity. In considering and deciding this case on a "due process theory," the *en banc* court is not "rehearing" anything; it is conducting an original hearing, and even then, on an issue the litigants have not presented.

2.

The case precedent in this circuit instructs courts to withhold judgment on issues not fully developed by the briefs or in the record. We have observed:

> "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones."

McPherson v. Kelsey, 125 F.3d 989, 995-96 (6th Cir. 1997) (quoting *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm'n*, 59 F.3d 284, 293-94 (1st Cir.

1995)); *see Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (citing *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996)), *cert. denied*, 121 S.Ct. 1355 (2001). Of relevance to what is being done in this case, we cautioned in *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993), that "it is not our function to craft an appellant's argument." *Id.* at 1080 n. 12. We have held that unbriefed issues are considered waived and unreviewable. *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1172 (6th Cir. 1996). It is for the parties, not the judges of this court, to raise important constitutional issues for our review, and only when such issues are raised, presented, and decided in the lower court. Our duty to decide such grave questions as the constitutional validity of an Act of Congress is properly discharged only when we have the benefit of a lower court decision, followed by full briefing and argument by the parties. *Sua sponte* rulings on issues of constitutional import first conjured by the court in its internal deliberations are plainly at odds with our duty to give such issues fully informed and deliberate consideration.

The Supreme Court has demonstrated its allegiance to this prudent approach in declining to decide the very issue before this panel. In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the Supreme Court declined to reach the *fully briefed* argument that Title II of the ADA violates the Eleventh Amendment. As the Court noted, even though the parties had briefed the argument, neither the district court nor the court of appeals had addressed the issue in its opinions and it did not wish to decide such an important matter without the lower

courts' views. *Id.* at 212-13. It is a wonder why this court would proceed where the Supreme Court would not.

To be sure, the briefs of the *amicus* and the intervenor presented due process arguments. The *amicus* OLRS advanced due process as one of three grounds for affirmance of the district court's judgment. In its intervenor's brief, the DOJ's due process argument arises as part of its general contention that Congress had before it a large body of evidence showing unconstitutional state action in the provision of public services to the disabled. The DOJ argued that Title II embodies a variety of constitutional rights, including Fourteenth Amendment due process rights. It is difficult to read either of these arguments as sufficiently briefing the difficult and abstruse due process issue the majority has handed to Popovich.

Despite the paucity of due process argument presented in the briefs, at oral argument one or two members of the court made repeated attempts to interest Popovich's counsel in the due process theory he had never advanced. In their "questions," these members attempted to explore a theory of Eleventh Amendment abrogation under a due process theory. They got very little clarification from Popovich's understandably surprised counsel. "One need only review the exchange at the *en banc* hearing of this case to know that many 'questions' posed by lawyers, and judges, while phrased in the form of questions are statements." *United States v. Susskind,* 4 F.3d 1400, 1410 (6th Cir. 1993) (*en banc*) (Merritt, J., dissenting). Despite the persistence of some members of the court, counsel for the parties failed to seize upon the due process argument.

B.

To summarize, the rule in this circuit is that it is not the appellate court's function to craft a party's argument. Absent some pressing concern, skeletal contentions are best left unaddressed. *En banc* proceedings represent an opportunity to clarify disputed matters of law fully vetted via lower court decisions, panel review, and *en banc* briefing. They are not occasions for the advancement of new constitutional theories unexplored by the parties with the attendant risk of confusing important areas of constitutional law. In *Garrett*, the Supreme Court declared: "We are not disposed to decide the constitutional issue whether Title II . . . is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question." *Garrett*, 531 U.S. at 360 n. 1. This court should abide by that same caution. The parties have not sufficiently presented, and the court has not sufficiently considered, the due process issue; it is for another day.

III.

Ignoring these compelling reasons for not addressing the due process theory, the majority has chosen to do so and, worse, has reached an erroneous conclusion. Consequently, I, too, must address the substantive merits of that argument.

Congressional efforts to abrogate Eleventh Amendment immunity should proceed mindful of the Supreme Court's admonition that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."

City of Boerne v. Flores, 521 U.S. 507, 527 (1997). True, "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (quoting *City of Boerne*, 521 U.S. at 518). But Congress's efforts at remedial legislation cannot impermissibly effect a substantive redefinition of the Fourteenth Amendment. *Id.*

Our primary focus in this case should be whether, in enacting Title II of the ADA, Congress has validly abrogated the states' Eleventh Amendment immunity. The answer is that it has not, and that answer is dictated by the Supreme Court's Eleventh Amendment jurisprudence which must guide our analysis of the issue. As the Supreme Court stated in *City of Boerne*, and most recently developed in *Garrett*, abrogation of Eleventh Amendment immunity under the Fourteenth Amendment's § 5 power is valid only if a court can: (1) identify the scope of the right at issue; and (2) ensure that Congress is truly "enforcing" that right by appropriate legislation. *Garrett*, 531 U.S. at 365-69. A statute is appropriately enforcing legislation under § 5 only if it is truly "remedial." *See Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638 (1999). "[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legitimate scheme to remedying or preventing such conduct." *Id.* at 639. In enacting Title II, Congress has not properly invoked § 5 because it has failed to identify

conduct transgressing the Fourteenth Amendment's due process right and failed to tailor Title II to carefully remedy such conduct.

A.

As the Supreme Court stated in *Garrett*, "The first step . . . is to identify with some precision the scope of the constitutional right at issue." 531 U.S. at 365. Here, the constitutional right the majority claims is at issue is the Fourteenth Amendment's due process right. It should be obvious, however, that analyzing the plaintiff's claim as a due process right, and not an equal protection right, does not *automatically* remedy Title II's Eleventh Amendment violation.

The majority conflates the task of defining the right at issue with the critical step of determining whether the statute is appropriate, remedial legislation. True, due process challenges merit different levels of review depending on the specific due process right enforced. However, the emotionally appealing argument made in the majority opinion that parents have due process rights in termination of custody proceedings does not obviate the need to confront and analyze the constitutional validity of Title II by first examining the Eleventh Amendment jurisprudence handed down by the Supreme Court.

Regardless of the right protected, if Congress wishes to legislatively abrogate the states' constitutional protection afforded by the Eleventh Amendment, it must first identify a history or pattern of state transgression of the *specific right* in question. As a second step, the court must

determine whether the remedy is "congruen[t] and proportional[ ]" to the transgression. *City of Boerne*, 521 U.S. at 520. Casting the argument in terms of parental rights in child custody termination proceedings, the majority opinion finds that the Supreme Court "has unanimously agreed that 'the interest of parents in their relationship with their children is sufficiently *fundamental* to come within the finite class of liberty interests protected by the Fourteenth Amendment.' " Maj. Op. at ___ (emphasis added) (quoting *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting)). Be that as it may, defining the scope of parents' due process rights does not conclusively determine whether the legislation in question has met the Supreme Court's well-settled criteria for overcoming the Eleventh Amendment. Properly focused on that task, I conclude that it is entirely clear that Congress met neither of the criteria for trumping the Eleventh Amendment: it did not make adequate findings of a pattern of state transgressions and the legislation does not create a congruent and proportional remedy.

B.

1.

Title II prohibits the exclusion of disabled individuals from participation in the activities of a public entity. 42 U.S.C. § 12132. Neither the language of the statute nor its legislative history give the slightest indication that when creating the statutory right, Congress identified a history or pattern of violations of disabled individuals' *due process* rights. In particular, there is no mention in the statute, either in its statement of legislative purpose or

elsewhere, of the rights of disabled parents in the conduct of child custody termination hearings. While Congress made ample findings of "discrimination," almost all of the findings properly sound in equal protection, not due process. I do not question for a moment the fact that disabled individuals in our society have faced severe discrimination and hardship. But, the Supreme Court's Eleventh Amendment jurisprudence requires specific findings of discriminatory *state* action. And those findings must include the conclusion that due process rights, in particular, were violated. The legislative history of Title II supports no such finding.

There is some indication in Title II's legislative history that it was passed in response to discrimination in the provision of public services and accommodations. In an exhaustive examination of the legislative history, the intervenor in this case notes a body of data demonstrating that disabled individuals have been denied *physical access* to courts, the right to vote, and educational opportunities. But it is quite clear that Congress assessed such evidence of discrimination as denial of equal protection, not denial of due process. For instance, the Committee on Education and Labor found that due to discrimination, the disabled have been denied "the opportunity to compete on an *equal* basis with others. . . . " H.R.Rep. No. 101-485(II), at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310 (emphasis added). The Committee on the Judiciary wrote that "the goal [of Title II] is to eradicate the invisibility of the handicapped. Separate-but-equal services do not accomplish this central goal and should be rejected." H.R.Rep. No. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 (internal quotation marks,

citation, and original alterations omitted). Finally, one of the ADA's sponsors in the House of Representatives stated: "Title II of this act is designed to continue breaking down barriers to the integrated participation of people with disabilities in all aspects of community life." 136 Cong. Rec. E1913, *E1916 (daily ed. May 22, 1990) (statement of Rep. Hoyer).

The court's effort to advance the due process theory at oral argument only confirmed further that the findings Congress had before it sounded in equal protection. After considerable prompting from the bench to shift from an equal protection theory to a due process theory, and then only in response to a question from one of the judges, Popovich's counsel asserted that Congress had made findings that Title II was intended to remedy due process violations. Seizing upon Justice Breyer's dissenting opinion in *Garrett*, counsel invited our attention to Appendix C of the Breyer dissent, which contains a description of the submissions offered to the Task Force on Rights and Empowerment of Americans with Disabilities. *Garrett*, 531 U.S. at 391-424. These are not congressional "findings." They are nothing more than claims of discrimination offered at the many public hearings held by the Task Force, not by Congress. The *Garrett* Court majority noted of Appendix C, that it "consists not of legislative findings, but of unexamined, anecdotal accounts of adverse, disparate treatment by state officials." *Garrett*, 531 U.S. at 370 (internal quotation marks and citation omitted). The notion that the members of Congress relied upon the Task Force *allegations* to determine that the states were engaging in a pattern of due process violations is an unsupportable fiction. Moreover, of the 1,700 or more instances of

discrimination identified by the Task Force and listed in Appendix C of Justice Breyer's dissent in *Garrett*, I can locate no more than 35 which arguably raise due process concerns. Of the limited number that could be read to implicate due process – whether it be procedural or substantive due process is another matter – the vast majority are concerned with physical access to polls and courthouses. While I do not doubt that these are serious impediments for the disabled, it is not clear what individual legislators made of these Task Force findings, if indeed they ever heard of them. The best that can be said for them is that they raise equal protection concerns. I have difficulty assigning much credence to the argument that members of Congress relied on Task Force reports which include conclusions such as "state university denied sabbatical proposal of faculty member with disability," *id.* at 410, or "child denied admission to public school because first-grade teacher refused to teach him," *id.* at 420. The intervenor and the majority opinion would have us infer that the individuals' disabilities *caused* the state to act as it did. But, such Task Force "findings" provide legislators with no support for the contention that the states violated disabled individuals' due process rights so routinely as to amount to a pattern of discrimination. Indeed, the findings tell legislators nothing about state actions toward the disabled.

Moreover, the ADA's statement of legislative Findings and Purpose offers no support for the contention that Congress identified a pattern of state due process violations. For instance, 42 U.S.C. § 12101 (expressing the ADA's Findings and Purpose) offers the following, in pertinent part:

> [D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.

Id. at § 12101(a)(3). One has to stretch mightily to read this language as an affirmative statement by Congress that it was identifying and remedying *state* action that violated disabled individuals' *due process* rights. This section is a statement of the act's purpose for each of the five titles in the ADA, and it cannot be read to refer to Title II specifically. Furthermore, with the exception of the reference to voting, I do not read in § 12101 the necessary finding by Congress that the disabled suffered violations of their due process rights at the hands of states.

Therefore, whatever might be said for the highly generalized statement of purpose with which Congress elucidated its goal in enacting the ADA, it certainly did not identify a pattern of due process violations.

2.

Congress's authority to enact general remedial legislation under § 5 is limited to rectifying conduct that is unconstitutional, not merely undesirable. While Congress determines whether and what legislation is necessary to enforce the guarantees of the Fourteenth Amendment, Congress may not define the bounds of a constitutional violation, *Kimel*, 528 U.S. at 80-81; only the courts may do that. And that is precisely the constitutional flaw in the ADA. The act proscribes too much conduct that is not

unconstitutional and thus effects a substantive redefinition of constitutional rights. The ADA's provisions must "be understood 'as responsive to, or designed to prevent, unconstitutional behavior.' " *Florida Prepaid*, 527 U.S. at 639 (quoting *City of Boerne*, 521 U.S. at 532). In the language of the Supreme Court, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. Title II fails the congruence and proportionality test.

Title II is an overbroad proscription. This court has noted on a previous occasion that § 12132 of Title II, which prohibits discrimination against the disabled, "encompasses virtually everything that a public entity does." *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998). Title II prohibits all state conduct that restricts access of the disabled to public services for any reason, without regard to whether the service invokes a constitutional right. Admittedly, Title II requires only "reasonable accommodation." *Id.* at 571. And a claimant's recovery under Title II is limited to compensatory damages. *Id.* at 573. But these limitations are of little comfort. The Eleventh Amendment does not protect state sovereignty only against relatively large damage awards or subjectively "unreasonable" incursions: it protects the whole of state sovereignty. By its overbreadth, Title II impermissibly attempts a substantive redefinition of Fourteenth Amendment due process.

A plain reading of Title II demonstrates that even if Congress had before it a pattern of state behavior violative of disabled individuals' due process rights, which it did not, Title II is not sufficiently nuanced to protect that

right. It is beyond question that Congress can protect constitutional rights, but it may not create them. As the Supreme Court has observed, "[W]e have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88. But, Title II prohibits much more behavior than is necessary to remedy any state violations of disabled individuals' due process rights. As the Court held in *Kimel*, "Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Id.* at 91. As discussed above, the legislative findings of unconstitutional behavior by the states contain little evidence directly implicating due process. The Supreme Court has made it very clear that Congress may not, through § 5 "enforcement" legislation, remedy that which it has not identified.

IV.

In summary, Eleventh Amendment abrogation under Congress's § 5 power is valid only if the legislation is truly enforcing legislation. The Supreme Court's analysis of whether legislation is permissible enforcing legislation turns on the determination of whether the legislation remedies unconstitutional state action, and whether it is tailored to avoid effecting a substantive redefinition of the constitutional right. Title II ventures far beyond the Court's definition of enforcing legislation. First, Congress failed to identify a pattern of state action that violates disabled individuals' due process rights, and, second, Title II of the ADA is not congruent and proportional to any identified state conduct. Therefore, Title II of the

ADA is not a constitutionally valid abrogation of state sovereign immunity.

I respectfully dissent.

CONCURRING IN PART, DISSENTING IN PART

RONALD LEE GILMAN, Circuit Judge, concurring in the judgment, but dissenting from the composition of the en banc court.

Although I fully concur in the judgment of the court that upholds the constitutionality of Title II of the Americans with Disabilities Act, I find myself in the unusual and uncomfortable position of having to write separately because I believe that there is a procedural flaw in the composition of the en banc court. Specifically, I am of the opinion that 28 U.S.C. § 46(c) (delineating which judges are eligible to sit on an en banc court) precludes Judge Merritt from participating in this case, despite language to the contrary in the version of this court's Internal Operating Procedure (I.O.P.) 35(a) that existed on the date of oral argument.

The problem arises from the fact that, although Judge Merritt was an "active" judge when the request was made in December of 2000 to rehear this case en banc, he took "senior status" on January 17, 2001. 28 U.S.C. § 371(b)(1)

(defining a senior circuit judge as one who is "retired from regular, active service"). Judge Merritt was thus not an active judge at the time this case was orally argued on June 6, 2001, nor was he a member of the original three-judge panel assigned to this matter.

The applicable statute, 28 U.S.C. § 46(c), as amended in 1996, provides in pertinent part as follows:

> A court in banc shall consist of all circuit judges in regular active service . . . except that any senior circuit judge of the circuit shall be eligible (1) to participate . . . as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

This court's former I.O.P. 35(a), in contrast, read as follows:

> The en banc Court is composed of all judges in regular active service at the time of a rehearing, any senior judge of the Court who sat on the original panel, *and any judge who was in regular active service at the time a poll was requested on the petition for rehearing en banc.* . . .

(Emphasis added.)

In comparing § 46(c) with this court's then-existing I.O.P. 35(a), one can immediately spot the discrepancy: the I.O.P. allowed a senior status judge to sit on an en banc case if the judge was active when the request for an en banc poll was made, but the statute requires a judge to still be active at the time the case is heard or reheard en

banc. Although not controlling in the present case, this discrepancy has been resolved for future cases by this court adopting a new I.O.P. 35(a) on October 31, 2001. The new I.O.P. 35(a) reads as follows:

> The en banc court is composed of (1) all judges in regular active service at the time of oral argument en banc or, if no oral argument en banc is held, on the date that the en banc court agrees to decide the case without oral argument, and (2) any senior judge of the Court who sat on the original panel. Only Sixth Circuit judges in regular active service may cast votes on a poll on the en banc petition itself. See 28 U.S.C. § 46(c).

For the remainder of this opinion, I will be referring to I.O.P. 35(a) as it existed when this case was orally argued on June 6, 2001. Because I.O.P. 35(a) did not conform with § 46(c) until the revised version of the I.O.P. was passed on October 31, 2001, we are left to determine the proper status of one in the position of Judge Merritt who was active when the en banc poll was requested, but who took senior status before the case was orally argued.

The issue as I see it is not whether our I.O.P. controls over § 46(c). I do not believe that anyone seriously contests the principle that an act of Congress prevails over an inconsistent internal rule of court. *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 464 (6th Cir. 1999) ("When a rule of court conflicts with a legislative act, the general rule is that the act controls."). Rather, the only question is whether one can possibly reconcile this court's I.O.P. with the statute by arguing that an en banc case is "heard or reheard" when the poll is requested rather than when the case is orally argued.

For the purpose of this decision, there is no relevant distinction between a case being heard en banc as opposed to being reheard en banc. A case is *heard* en banc in the rare situation when the whole court decides to take up an appeal directly, without the matter first being decided by a three-judge panel. In contrast, a case is *reheard* en banc in situations where the court grants a party's petition for rehearing by the entire court after a three-judge panel has ruled adversely to that party. This case involves the more typical rehearing after a decision by a three-judge panel. For the sake of simplicity and clarity, however, I will confine further discussion to the issue of determining when a case is *heard* en banc. The same conclusion necessarily follows for a case *reheard* en banc.

Turning now to this key issue, I find no support for the proposition that a case is heard en banc when a poll is requested to determine whether the case should be considered by the court as a whole. Polling is a procedural matter, not a decision on the merits of the case. Nor does such a proposition comport with the common understanding of what being "heard" means. Black's Law Dictionary 725 (7th ed.1999) (defining a "hearing" as "[a] judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying.").

In 1996, § 46(c) was amended to allow a senior judge "to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service." 28 U.S.C. § 46(c); Pub. L. No. 104-175, § 1. The legislative history reflects that the 1996 amendment to 28

U.S.C. § 46(c) was proposed in order to resolve the ambiguity of whether a judge on active status when an en banc case is orally argued can continue to participate if he or she takes senior status before the opinion is issued. Senator Simon of Illinois stated the issue as follows: "The bill I introduce today would simply clarify that circuit judges who hear an en banc case as active judges may participate in the ultimate decision of the case even if they take senior status between the time the case is argued and the time it is decided." 141 Cong. Rec. S2133 (daily ed. Feb. 3, 1995). Similarly, Representative Moorehead of California made the following observation:

> [Section 46(c)] has been interpreted to require a circuit judge in regular active service who has heard argument in an en banc case to case [sic, clearly a mistype of "cease"] participating in that case upon taking senior status. This problem leads to uncertainty in deciding who will be eligible to vote on the final disposition of an appeal and may create the perception that a judge is delaying release of an en banc opinion until a member of the en banc court takes senior status.

142 Cong. Rec. H8608 (daily ed. July 29, 1996).

Turning now to the matter at hand, I believe it quite clear that this case was "heard" on June 6, 2001. This was the date of oral argument, the date when the judges of the en banc court retired to discuss the merits following oral argument, and the date when we tentatively voted on the outcome of the case. In contrast, the request for a poll of the active judges in December of 2000 to vacate the ruling of the three-judge panel and consider the case en banc was not outcome-determinative. That action simply set

the stage for the hearing on the merits that took place six months later.

Judge Merritt was no longer an active judge when the case was heard en banc (i.e., orally argued, discussed in conference, and tentatively decided) on June 6, 2001. He was therefore ineligible to sit as a member of the en banc court pursuant to the express terms of 28 U.S.C. § 46(c), despite language to the contrary in this court's then-existing I.O.P. 35(a). Expressed another way, our former I.O.P. 35(a) was void because it directly conflicted with the controlling statutory language of § 46(c). *Memphis Planned Parenthood, Inc.*, 175 F.3d at 464. In contrast, both Judge Norris (who took senior status on July 1, 2001) and Judge Suhrheinrich (who took senior status on August 15, 2001) are authorized by the language of § 46(c) to continue participating in this case, because they were both active judges when the matter was heard on June 6, 2001.

I reach this conclusion with great reluctance, both because I recognize that the validity of our former I.O.P. 35(a) has not been previously questioned in this case, and because I agree with the result reached in Judge Merritt's opinion. Nor do I wish to impugn in any way Judge Merritt's integrity or his good faith belief that he is entitled to sit as a member of the en banc court. Based upon my analysis of § 46(c), however, I feel that I have no choice but to voice my disagreement with the composition of the en banc court in this case.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH M. POPOVICH,	)	
Plaintiff-Appellee/ Cross-Appellant,	)	
v.	)	Nos. 98-4100/4540
CUYAHOGA COUNTY COURT OF COMMON PLEAS, Domestic Relations Division,	)	
Defendant-Appellant/ Cross-Appellee,	)	
CUYAHOGA COUNTY,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 95-00684 – James S. Gallas, Magistrate Judge.

Argued: April 26, 2000

Decided and Filed: September 18, 2000

Before: RYAN and BOGGS, Circuit Judges;
DUGGAN, District Judge

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* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

COUNSEL

ARGUED: Bruce B. Elfvin, ELFVIN & BESSER, Cleveland, Ohio, for Appellant. Richard C. Haber, REMINGER & REMINGER, Cleveland, Ohio, for Appellee. **ON BRIEF:** Bruce B. Elfvin, Barbara Kaye Besser, Amy S. Glesius, ELFVIN & BESSER, Cleveland, Ohio, for Appellant. Richard C. Haber, REMINGER & REMINGER, Cleveland, Ohio, for Appellee.

OPINION

RYAN, Circuit Judge. This case presents a question of first impression in this court: whether Congress validly abrogated Eleventh Amendment immunity by applying Title II of the Americans with Disabilities Act (ADA) to the States. We hold that it did not and that, as a consequence, we must reverse the district court's judgment for the plaintiff.

Joseph M. Popovich brought three federal claims against the Domestic Relations Division of the Cuyahoga County Court of Common Pleas (DRD), an arm of the State of Ohio, alleging: (1) failure to accommodate his hearing disability, in violation of Title II of the ADA; (2) retaliation, in violation of the ADA; and (3) a 42 U.S.C. § 1983 claim. Popovich's claims arise out of the DRD's alleged failure to provide him with an adequate hearing aid in the course of a prolonged child custody dispute. A jury awarded Popovich $400,000 in compensatory damages and the district court awarded injunctive relief.

Despite myriad issues raised on appeal, we need reach only one: whether Congress exceeded its authority in purporting to abrogate Eleventh Amendment immunity under Title II. As we have said, we hold that it did and therefore we will REVERSE the district court's judgment.

I.

A. *FACTUAL BACKGROUND*

Popovich was divorced in 1985. On August 9, 1990, Popovich's ex-wife Norma Jenell Whisenant filed a motion with the DRD to enforce her right of companionship with her daughter, a child of her marriage to Popovich. During a hearing on the motion in August 1992, Popovich informed the hearing referee that he was having trouble hearing the proceedings, making his participation difficult. The referee postponed the proceedings to resolve Popovich's concern and ordered him to undergo an audiological examination at his own expense. The exam confirmed that Popovich had mild to moderate hearing loss with no sign of an ear infection or other disease. Based on her examination of Popovich, the audiologist recommended that the court provide an FM amplification system with a pass-around microphone and headphones.

On August 24, 1992, while the custody action was still pending, Whisenant filed a petition of domestic violence requesting a temporary restraining order against Popovich. The next morning, the DRD held an *ex parte* hearing and granted the mother temporary custody of her daughter. The daughter was removed from Popovich's home, and Popovich was prohibited from having any

contact with her. On the same day, the DRD held a hearing to consider the results of Popovich's audiological exam. The parties stipulated that Popovich suffered from a hearing impairment that required "speech augmentation equipment." The DRD adopted most of the audiologist's recommendation, agreeing to use an FM amplification system to accommodate Popovich's hearing loss. For security reasons, however, the DRD decided to use a conference-style microphone rather than a so-called "pass-around" microphone. Popovich's counsel acknowledged at the time that this accommodation was satisfactory, and Popovich has not challenged the DRD's decision to use a conference-style microphone rather than a pass-around microphone.

The DRD declared a mistrial in the custody case on August 27, 1992, and reassigned the case to another judge. Between September 2 and October 23, a referee held hearings on the domestic violence petition. During these hearings, the DRD used the FM amplification system with the centrally located microphone, and Popovich wore headphones.

On October 23, Popovich complained to the referee of an ear infection, claiming it was due to his use of the headphones. Popovich moved for a continuance to allow the infection to clear up. Attached to the motion was a letter from Popovich's physician stating that he had been under a physician's care for an ear infection that was expected to improve in three to four weeks. The referee granted a continuance and requested that Popovich provide the DRD with information from a physician about the ear infection. The deadline for submission of this information was November 5, and the custody hearing

was adjourned to December 1, 1992. Popovich, however, provided no further information to the DRD concerning the ear infection or its prognosis.

On December 1, a few minutes before the hearing was to recommence, Popovich filed a motion requesting real-time captioning in the courtroom to accommodate his hearing deficiency. The referee gave Popovich the choice of proceeding with the custody hearing that day using the FM amplification system, or staying the custody hearing and scheduling a later hearing on the motion for real-time captioning. Popovich chose the latter option. A hearing to determine the appropriate accommodation was scheduled for February 1, 1993, but it was canceled due to the referee's illness.

Although Popovich's counsel initially conceded that the FM amplification system was effective, Popovich apparently had concerns about the DRD's response to his hearing deficiency almost from the beginning. In late August 1992, well before the ear infection, Popovich filed a charge of discrimination with the Department of Justice (DOJ) concerning the DRD's actions to accommodate his hearing deficiency. The DOJ commenced an investigation. The DRD was notified on December 2, 1992, of the discrimination charge and the DOJ's investigation.

On February 19, 1993, and again on March 24, the DOJ recommended to the DRD that it recommence the custody proceedings. On May 28, the DOJ sent a letter to the DRD requesting a response to Popovich's discrimination charge. In its response, the DRD stated that Popovich was free to bring any auxiliary aid to the courtroom at his own expense, but it insisted that the DRD had met its

obligation to reasonably accommodate Popovich's condition by providing the FM amplification system.

On June 1, 1993, Whisenant filed a motion requesting that the DRD continue the August 1992 *ex parte* order. The court granted the motion, extending the order over Popovich's objection.

On March 31, *1994*, the DOJ informed the DRD that the DRD could hold an *ex parte* hearing or an informal hearing to determine the appropriate auxiliary aid. The judge convened a conference four months later to discuss auxiliary aids. At the conference, Popovich presented evidence of his hearing loss and a severe skin condition in both ear canals. On October 7, the DRD agreed to order real-time captioning for Popovich. The DRD judge entered an order shortly thereafter allowing Popovich to visit his daughter. For reasons not apparent to this court, Popovich waited until the summer of 1997 to see his daughter. His daughter moved in with him on October 31, 1997, despite a state court order prohibiting such living arrangement.

B. *PROCEDURAL HISTORY*

Popovich filed his complaint in federal district court on March 23, 1995, and an amended complaint on September 15, 1995. His amended complaint alleged that the DRD and Cuyahoga County discriminated against him in violation of Title II of the ADA, retaliated against him in violation of the ADA, and violated 42 U.S.C. § 1983. Popovich claimed that as a result of the defendants' conduct, he was prohibited from seeing his daughter for

approximately five years, from the time she was 11 years old until she was 16.

On April 6, 1998, a jury returned a verdict for Popovich, finding that the defendants violated Title II of the ADA and/or retaliated against him in violation of the ADA. The jury awarded compensatory damages in the amount of $400,000. The magistrate judge entered the jury's award and, based on the jury's finding, awarded injunctive relief: (1) requiring the defendants to provide real-time captioning for Popovich in the state custody matter; (2) enjoining the defendants from discriminating against him in connection with providing any auxiliary aids; and (3) enjoining the defendants from retaliating against him. The defendants filed timely post-trial motions for new trial, for judgment as a matter of law, and for remittitur. The district court granted judgment as a matter of law in favor of Cuyahoga County, but denied the remainder of the requested relief. The court also denied Popovich's request for pre-judgment interest.

The defendants filed a timely notice of appeal. Popovich cross-appealed the dismissal of Cuyahoga County and the denial of pre-judgment interest. However, at oral argument before this court, Popovich withdrew his cross-appeal against the County and waived his right to appeal the pre-judgment interest issue as a matter of law, because his briefs did not address it. *See Buziashvili v. Inman*, 106 F.3d 709, 719 (6th Cir. 1997). Therefore, we will consider only the claims against the DRD.

II.

A. *JURISDICTION TO CONSIDER ELEVENTH AMENDMENT IMMUNITY*

We first address the plaintiff's contention that we lack jurisdiction to consider the DRD's Eleventh Amendment argument. The plaintiff maintains that the DRD waived its right to assert this defense by failing to raise the issue earlier in the proceedings. We disagree.

Although the DRD claimed in its amended answer that it is "immune" from liability, its immunity argument before the district court focused solely on judicial immunity. The DRD never explicitly invoked Eleventh Amendment immunity at the district court level, nor did its original appeal brief touch on the issue. The DRD first mentioned the Eleventh Amendment in its reply brief on appeal, and even that reference was cryptic.We certainly do not condone the DRD's late assertion of Eleventh Amendment immunity, but we do not think we are, as a matter of law, foreclosed from considering it. Indeed, for the reasons that follow, we are satisfied that we have discretion to do so.

The Eleventh Amendment immunity defense may be raised for the first time on appeal. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). We may even consider the issue *sua sponte. Estate of Ritter v. University of Michigan,* 851 F.2d 846, 850 (6th Cir 1988); *State of Ohio v. Madeline Marie Nursing Homes No. 1 and No. 2,* 694 F.2d 449, 459-60 (6th Cir. 1982). Indeed, there is authority in this circuit holding that we *must* consider Eleventh Amendment immunity *sua sponte. Wilson-Jones v. Caviness,* 99 F.3d 203, 206 (6th Cir. 1996), *as amended by* 107 F.3d 358, 358-59 (6th Cir.

1997). The plaintiff argues that *Wilson-Jones* is no longer good law in light of *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998), in which the Supreme Court stated that a court need not address Eleventh Amendment immunity if the parties do not raise it. *Schacht*, 524 U.S. at 389. While *Schacht* casts doubt on our holding in *Wilson-Jones*, neither the Supreme Court nor this court has suggested that we lack jurisdiction to consider an Eleventh Immunity defense raised late in the proceedings, or not at all. *See Mixon v. State of Ohio*, 193 F.3d 389, 397 (6th Cir. 1999).

The plaintiff urges us to follow authority from the Ninth and First Circuits holding that a state defendant waives its right to assert Eleventh Amendment immunity by failing to raise it earlier in the proceedings. *See Hill v. Blind Indus. & Servs. of Maryland*, 179 F.3d 754, 756-58 (9th Cir. 1999), *as amended by* 201 F.3d 1186 (9th Cir. 2000); *Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 5 (1st Cir. 1999). To the extent that these authorities may stand for the proposition that we lack *discretion* to hear a late Eleventh Amendment defense, we decline to follow them.

At oral argument, the plaintiff also relied on *Cuyahoga Valley Railway Co. v. Tracy*, 6 F.3d 389 (6th Cir. 1993), in arguing that the DRD waived the immunity argument by failing to raise it earlier. That case is distinguishable. In *Cuyahoga*, intrastate railroads challenged Ohio's railroad excise tax. The district court entered summary judgment in favor of the railroads, *and the State of Ohio did not appeal this order.* Several months later, interstate railroads moved to intervene. The court granted the intervention motions and entered a modified summary judgment in favor of the intervenors, limiting the scope

of summary judgment to apply only to the original plaintiffs. The State appealed, challenging the order granting intervention and the order modifying summary judgment. As to summary judgment, the State argued that the court's remedy violated the Eleventh Amendment. *Id.* at 394. We held that the State had waived its right to raise this argument by failing to timely appeal the original summary judgment. *Id.* at 395. Here, in contrast, the DRD timely appealed the district court's judgment. Although *Cuyahoga* also recites in a footnote the general rule that we "will not consider arguments raised for the first time on appeal," *id.* at 395 n.6, it does not limit our discretion to do so in the appropriate case.

We are satisfied that the clear weight of authority is that it is within our discretion to decide when the circumstances merit consideration of a delayed sovereign immunity defense, and we believe it is appropriate to do so in this case for a number of reasons: the importance of the issue; its wide-reaching effect; the substantial uncertainty about the current state of the law; and the fact that, in response to our request the parties have submitted supplemental briefs on the issue.

The availability of Eleventh Amendment immunity under the ADA has split the circuits, and neither the Supreme Court nor this court has tackled the issue to date. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Nelson v. Miller*, 170 F.3d 641, 647-48 (6th Cir. 1999). The parties in this action, and other parties who may be pursuing or preparing to pursue claims under Title II, deserve our answer to this question. Moreover, because the parties have now fully briefed the

issue at our post-hearing direction, the plaintiff has suffered no prejudice from the DRD's failure to raise Eleventh Amendment immunity earlier in the proceedings.

B. *AVAILABILITY OF ELEVENTH AMENDMENT IMMUNITY*

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has interpreted this language to mean "that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman*, 415 U.S. at 663. An Ohio Common Pleas Court, including the Domestic Relations Division, is "an arm of the state for purposes of . . . Eleventh Amendment immunity analys[i]s." *Mumford v. Basinski*, 105 F.3d 264, 269 (6th Cir. 1997). Thus, we must decide whether the DRD is immune from suit in federal court.

There are three exceptions to a State's sovereign immunity under the Eleventh Amendment. First, a State waives the immunity when it consents to suit in federal court. *See Green v. Mansour*, 474 U.S. 64, 68 (1985); *Nelson*, 170 F.3d at 645-46. It is undisputed that the DRD has not done so here. *See Mixon*, 193 F.3d at 397. Second, the Amendment does not bar a suit against a state official seeking prospective injunctive relief to end a continuing violation of federal law. *Ex parte Young*, 209 U.S. 123, 167

(1908); *Lawson v. Shelby County, Tennessee*, 211 F.3d 331, 335 (6th Cir. 2000). This exception is also inapplicable, as Popovich no longer asserts any claim against a "state official."

A third exception applies where Congress validly abrogates Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996); *Nelson*, 170 F.3d at 646. This is the exception at issue here, and we now proceed to consider it.

1. *The Abrogation Exception*

a. Clear and Unequivocal Statement

As a preliminary matter, we note that Popovich's claim arises under Title II, Part A, of the ADA. Title II, Part B, of the ADA governs public transportation, and we have not had occasion to consider the provisions of Part B in this case. We intend our references to the "ADA" in this opinion to refer solely to Title II, Part A, of the ADA.

To determine whether Congress validly abrogated State immunity under Title II of the ADA, we must resolve two issues: (1) "whether Congress unequivocally expressed its intent to abrogate" the immunity; and (2) "if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640 (2000). As to the first question – whether Congress unequivocally stated its intent to abrogate the immunity under Title II – there is no question that it did. *See Nelson*, 170 F.3d at 647 n.6. In 42 U.S.C. § 12202, Congress expressly stated: "A State shall not be

immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of" the ADA. *Id.* In addition, Title II's substantive requirements govern the conduct of any "public entity," defined to include "any *State* or local government." 42 U.S.C. § 12131(1)(A) (emphasis added).

b. Valid Exercise of Constitutional Authority

The second prong of the abrogation exception – whether, in abrogating the State's Eleventh Amendment immunity, Congress acted pursuant to a valid grant of constitutional authority – is more complicated. We recently explained that this prong involves two inquiries: (1) whether Title II of the ADA was " 'passed pursuant to a constitutional provision granting Congress the power to abrogate' "; and (2) "whether the substantive provisions of the ADA are a valid exercise of Congress's [enforcement] power" under the relevant constitutional provision. *Nelson*, 170 F.3d at 648 (quoting *Seminole Tribe*, 517 U.S. at 59). The Supreme Court has made clear that the Commerce Clause is not a source of authority for Congress to abrogate Eleventh Amendment immunity. *Seminole Tribe*, 517 U.S. at 72-73. However, the Court has said that Congress does derive such authority from Section 5 of the Fourteenth Amendment. *Id.* at 59. The Amendment provides, in relevant part:

> **Section 1**. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

> life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> **Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5. Congress invoked Section 5 of the Fourteenth Amendment as one of its sources of authority in enacting the ADA. 42 U.S.C. § 12101(b)(4). Thus, Title II was "passed pursuant to a constitutional provision granting Congress the power to abrogate." *Nelson*, 170 F.3d at 648.

The current debate over Eleventh Amendment immunity focuses not on the *source* of Congress's abrogation authority, but the scope of that authority. *See id.* Over the past three years, the Supreme Court has addressed the scope of Congress's enforcement authority under the Fourteenth Amendment on several occasions. *See Kimel*, 120 S. Ct. 631; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997). This jurisprudence guides our analysis, and we pause to summarize its most salient features.

Congress's enforcement power under the Fourteenth Amendment "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 120 S. Ct. at 644. On the other

hand, authority to determine " 'what constitutes a constitutional violation' " resides solely with the courts – not with Congress. *Id.* (emphasis omitted) (quoting *City of Boerne*, 521 U.S. at 519). In other words, "Congress does not enforce a constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519. The Court has acknowledged that this simple distinction is not easy to apply. "[T]he determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. The line between the two is a fine one," and Congress has " 'wide latitude' " in deciphering that line. *Kimel*, 120 S. Ct. at 644 (citations omitted). To aid courts in this delicate analysis, the Supreme Court has adopted the following principle: Congress properly exercises its Fourteenth Amendment enforcement authority where there is " 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

Two recent Supreme Court cases illustrate the application of the "congruence and proportionality" test. The Court first adopted the test in *City of Boerne*, 521 U.S. 507. There the Court held that Congress exceeded its authority under the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993 (RFRA). The RFRA prohibited governments, including States, from " 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of

furthering that compelling governmental interest.' " *Id.* at 515-16 (citations omitted). The proponents of the RFRA argued that the statute's focus on the effects of a challenged ordinance, rather than deliberate or overt discrimination, fell within Congress's power under the Fourteenth Amendment to prevent and remedy constitutional violations. *Id.* at 517.

In applying the "congruence and proportionality" test, the Court looked to the legislative history for evidence of conduct violating the Fourteenth Amendment – in other words, evidence of "generally applicable laws passed because of religious bigotry." *Id.* at 530. The RFRA's legislative history is devoid of such evidence. In fact, the legislative history indicates that "Congress' concern was with the incidental burdens imposed," rather than the "object or purpose of the [challenged] legislation." *Id.* at 531. The lack of evidence of a constitutional violation, however, was not the RFRA's "most serious shortcoming." *Id.* The Court concluded:

> RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws [or conduct] may be appropriate when there is reason to believe that many of the laws [or conduct] affected by the congressional enactment have a significant likelihood of being unconstitutional. . . .
>
> RFRA is not so confined.

Id. at 532.

While Popovich's case was pending, the Supreme Court extended its Eleventh Amendment jurisprudence in *Kimel*, 120 S. Ct. 631, a case that is analogous in many respects to this case. In *Kimel*, several groups of plaintiffs filed suit against their State employers claiming protection under the Age Discrimination in Employment Act (ADEA). After finding that Congress had unequivocally expressed its intention to apply the ADEA to the States, the Court proceeded to apply the "congruence and proportionality" test and held that Congress exceeded its authority to abrogate Eleventh Amendment immunity in applying the ADEA to the States. *Id.* at 637.

The Court began its analysis by observing that age is not a suspect classification under the Equal Protection Clause. *Id.* at 646. Thus, a State "may discriminate on the basis of age" if age is "rationally related to a legitimate state interest." *Id.* This, of course, is a fairly low hurdle to clear. The Court " 'will not overturn [government conduct] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.' " *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). It makes no difference that age is an imperfect proxy for characteristics relevant to the State's legitimate interests. *Id.* The Constitution "permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Id.* at 647.

The Court then evaluated the substantive provisions of the ADEA against the backdrop of the Fourteenth

Amendment requirements. The ADEA prohibits employers from discriminating on the basis of age, with only a few narrow exceptions. The Court found that the law, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* The Court also rejected the petitioners' reliance on the statutory exceptions under the ADEA, reasoning that even with those exceptions the law restricted the States' conduct far more than the rational basis test. *Id.* For example, the "bona fide occupational qualification" (BFOQ) exception imposed a burden on the employer to prove "reasonable necessity" for using an age classification, which the Court described as "a far cry from the rational basis standard we apply to age discrimination under the Equal Protection Clause." *Id.* The Court concluded that the ADEA was "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' " *Id.* (quoting *City of Boerne,* 521 U.S. at 532).

The Court also recognized Congress's power to enact prophylactic legislation. *Id.* at 648. The Court held, however, that the ADEA was not properly characterized as remedial because Congress did not have evidence of a significant problem of constitutional dimension requiring prophylactic legislation. *Id.* at 648-49. As it had in *City of Boerne,* the Court relied on the legislative history as a means to evaluate whether a significant evil justified Congress's strong remedial measures. *Id.* at 648; *see also Florida Prepaid,* 119 S. Ct. at 2207-11.

> Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports.

Kimel, 120 S. Ct. at 648-49. The Court rejected the petitioners' reliance on Congress's findings of age discrimination in the private sector, reiterating Congress's failure "to identify a widespread pattern of age discrimination by the States." *Id.* at 649.

The Court concluded:

> In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.

Id. at 650.

2. *Title II of the ADA*

As we have said, because it is clear that Congress satisfied the first prong of the abrogation exception by clearly and unequivocally stating its intent to abrogate

Eleventh Amendment immunity under the ADA, our task is to decide whether, in doing so, Congress exceeded its authority to enforce the Fourteenth Amendment. Although the statutes involved in *Kimel* and *City of Boerne* are distinguishable in several respects from the ADA, these distinctions are not sufficient to protect Title II from the fate that befell the RFRA and the ADEA. Indeed, we believe that the ADA shares attributes with both the RFRA and the ADEA that make this law even more difficult to justify under Section 5 of the Fourteenth Amendment.

To apply the "congruence and proportionality" test, we first must identify the "unconstitutional conduct that conceivably could be targeted by the [ADA]." *Kimel*, 120 S. Ct. at 645. Title II provides, in relevant part:

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Thus, Title II is designed to protect disabled persons, as defined under the statute. *See id.* § 12131(2).

It is well established that disability is not a suspect class for purposes of equal protection analysis. *Heller v. Doe*, 509 U.S. 312, 321 (1993); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-47 (1985); *see also Bartell v. Lohiser*, 215 F.3d 550, 559 (6th Cir. 2000). The State may discriminate on the basis of disability if such classification is rationally related to a legitimate state interest. We recognize that the reasons identified in *Kimel* as to why

age-based classifications do not deserve heightened scrutiny under the Equal Protection Clause are not justifications that necessarily apply in the disability context. For example, the Court noted that "[o]ld age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Kimel*, 120 S. Ct. at 645. However, *Kimel* does nothing to undermine the Supreme Court precedent holding that disability deserves only rational basis scrutiny; we are bound to follow this precedent. Likewise, Congress's characterization of the disabled as a "discrete and insular minority" in the text of the ADA, 42 U.S.C. § 12101(a)(7), cannot override *Cleburne*. This legislative "finding," invoking the buzzwords associated with heightened scrutiny, "evinces an intent not to remedy [conduct that violates the *Cleburne* rational basis standard], but rather to effect a substantive alteration of" *Cleburne*. *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 708 (4th Cir. 1999) (internal quotation marks and citation omitted), *petition for cert. filed*, 68 USLW 3164 (U.S. Sept. 8, 1999) (No. 99-424). As such, the "discrete and insular" finding provides a strong, if inconclusive, clue that Congress was acting outside of its Fourteenth Amendment enforcement authority in applying the ADA to the States.

The Equal Protection Clause does afford some protection to disabled individuals. "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). On the other hand, a *facially neutral* law or policy that adversely impacts the disabled will violate equal protection only

where the law or policy "was promulgated . . . *because of*, not merely in spite of, its adverse impact on" disabled persons. *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994) (citing *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)). " ' "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences.' " *Horner*, 43 F.3d at 276 (quoting *Feeney*, 442 U.S. at 279).

Our comparison of Title II to the Fourteenth Amendment equal protection guarantee leads us to conclude that Title II of the ADA is " 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' " *Kimel*, 120 S. Ct. at 647 (quoting *City of Boerne*, 521 U.S. at 532). Like the ADEA, Title II of the ADA prohibits a broad swath of conduct without permitting *any* inquiry into the State's legitimate interests. Indeed, Title II's prohibition on "discrimination" is even more stringent than that under the ADEA, given that the ADEA incorporates statutory exceptions whereas Title II of the ADA does not. *See Kimel*, 120 S. Ct. at 647. We agree with the Seventh Circuit's observation that the ADA goes beyond Congress's power under the Constitution in that

> State practices affecting the disabled do not receive the same presumption of legitimacy that they do under rational basis scrutiny. . . . [U]nder the ADA it is no longer the case that any rational reason will support the State's action. . . . Moreover, while the Fourteenth Amendment allows the State to make broad generalizations about the disabled, the ADA "starts with a presumption in favor of requiring

> the [State] to make an individualized determination.". . . .
>
> As with the [ADEA] discussed in *Kimel*, the ADA shifts the burden in a disability discrimination case from the individual to the State, raises the level of judicial scrutiny from rationality review to a heightened level of scrutiny, and disallows the approximations and generalizations that are permitted for classes that otherwise receive only rational basis protection.

Stevens v. Illinois Dep't of Transp., 210 F.3d 732, 738 (7th Cir. 2000) (quoting *Kimel*, 120 S. Ct. at 647), *petition for cert. filed*, 69 USLW 3022 (U.S. June 30, 2000) (No. 00-7). On this basis alone, we could find that the ADA "prohibits substantially more [State conduct] than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 120 S. Ct. at 647.

We need not rely on the prohibitive component of Title II alone, however, because Title II extends well beyond it. Although Title II's explicit provisions merely *prohibit* public entities from excluding disabled individuals from participating in, or enjoying the benefits of, public services, it contains another implicit requirement. Specifically, Title II defines a "qualified individual with a disability" to mean:

> an individual with a disability who, *with* or without *reasonable modifications* to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, *or the provision of auxiliary aids and services*, meets the essential eligibility requirements for the receipt

> of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (emphasis added). In effect, this definition imposes an affirmative obligation on public entities to accommodate disabled individuals. It is this obligation that lies at the heart of this case, as Popovich claims that the DRD denied him appropriate auxiliary aids to accommodate his hearing disability.

There is no statutory exception to Title II's duty to accommodate; the only exceptions appear in the enforcing agency's regulations. Even if we were convinced that regulations can save an otherwise invalid statute – and we are not – resort to the regulations in this case is not helpful to the plaintiff. Like the limited statutory exceptions that could not save the ADEA in *Kimel*, the regulatory exceptions in this case result in a scheme that imposes far more restrictions on state action than would be the case under a rational basis standard. For example, the regulations excuse a public entity from the obligation to modify policies, practices or procedures only if the entity "can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added). Similarly, with regard to communication aids, the regulations adopt a "fundamental alteration" exception and an "undue financial and administrative burdens" exception. 28 C.F.R. § 35.164. The public entity bears the burden of proving such alteration or burdens "after considering all resources available for use in the funding and operation of the service, program, or activity." *Id.* We note that a plurality of the Supreme Court, in a recent Title II

case involving the right of disabled individuals to community-based treatment, has interpreted section 35.130(b)(7) to permit more flexibility than its plain language might suggest. *Olmstead v. Zimring*, 119 S. Ct. 2176, 2188-90 (1999). In *Olmstead*, the Court construed the "fundamental alteration" exception to "allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 2189. However, as we explain below, even this liberal interpretation of one of the accommodation exceptions, like the ADEA's BFOQ defense, imposes a burden on the States that is " 'significantly different' " from a rational basis test. *See Kimel*, 120 S. Ct. at 647 (quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 421 (1985)).

The accommodation requirement, with its limited regulatory exceptions, reaches far beyond conduct likely to violate the Equal Protection Clause. Accommodation requires special treatment for the disabled in situations where facially neutral policies and practices adversely impact the disabled due to their physical or mental impairments. Such action may be constitutionally required only in cases where the State adopts the challenged policy *because of*, not in spite of, the limitations of the disabled. Title II makes no attempt to distinguish between those neutral policies that violate the Equal Protection Clause and those that do not. This case illustrates the point. There was no evidence that the DRD designed its courtroom with the intention of discriminating against

disabled individuals; that the absence of an FM amplification system or real-time captioning in the courtroom was due to a discriminatory motive; or that the DRD refused to provide real-time captioning because of Popovich's hearing loss. Popovich, therefore, could not succeed in a claim under the Equal Protection Clause. Title II provided more relief in this case than would otherwise be available under the Fourteenth Amendment.

In this sense, the accommodation requirement under the ADA is reminiscent of the ill-fated RFRA.

What the RFRA did for religion, the ADA does for disabilities. In neither situation does the Constitution forbid neutral laws or practices that create disparate impacts; in neither situation does the Constitution require accommodation. . . . [Indeed,] there is a countervailing difference that makes the ADA the more adventuresome. The Free Exercise Clause forbids all intentional discrimination against religious practices; the Equal Protection Clause has no similar rule about disabilities. Rational discrimination against persons with disabilities is constitutionally permissible in a way that rational discrimination against religious practices is not. This makes the ADA harder than the RFRA to justify under § 5. . . . *[N]o one* believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA.

Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Illinois Univ., 207 F.3d 945, 951 (7th Cir. 2000), *petition for cert. filed*, 68 USLW 3003 (U.S. June 26, 2000) (No. 99-2077).

This does not end our inquiry, however. The Supreme Court has made clear that Congress has authority under the Fourteenth Amendment to enact broad prophylactic legislation, even if it regulates a substantial amount of conduct that does not run afoul of the Constitution. We must carefully distinguish between valid prophylactic legislation and legislation that substantively alters the scope of constitutional guarantees. In *Kimel,* the Court made very clear that Congress may overstep its bounds in enacting broad remedial legislation when the legislative history fails to evidence significant constitutional violations requiring such "powerful remedies." *Kimel,* 120 S. Ct. at 648.

We have thoroughly reviewed the legislative history of the ADA. Despite its volume, we find that the legislative history of this statute suffers from the same deficiencies the Court identified in *Kimel.* There is virtually no evidence that the States have engaged in a widespread pattern of *unconstitutional* discrimination against the disabled in the provision of public services. The only relevant evidence "consists almost entirely of isolated sentences clipped from floor debates." *Id.* at 649. *See Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988; Hearing Before the Subcommittee on Select Education of the House Committee on Education and Labor,* 100th Cong. 100-109, at 50 (1988) (statement of Ilona Durkin, Connecticut Traumatic Brain Injury Ass'n, Inc.) ("State agencies discriminate against people with traumatic brain injury because of their disability"), *reprinted in* 2 Bernard D. Reams, Jr., *et al.,* Disability Law in the United States: A Legislative History of the Americans with Disabilities Act

of 1990 Public Law 101-336 (1992) [hereinafter ADA Legislative History]; and *Americans with Disabilities Act of 1989; Hearings Before the Committee on Labor and Human Resources and the Senate Subcommittee on the Handicapped*, 101st Cong. 101-156, at 658 (1989) (appendix) (prepared statement of Laura Oftedahl, Director of Public Affairs, Columbia Lighthouse for the Blind) (describing barriers to accessing information from public agencies in braille, large-print, recorded, or computer-accessible form), *reprinted in* 2 ADA Legislative History; United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, at 40, 168 (Sept. 1983) (stating that disabled individuals have been denied the right to vote, hold public office, obtain a driver's license or hunting license, serve on juries, and marry).

Congress did include some specific findings in the ADA itself identifying discrimination against the disabled as a "serious and pervasive social problem" and stating that discrimination against the disabled affects "access to public services." 42 U.S.C. § 12101(a)(2)-(3). In our view, these generalized and unsupported "findings" do not cure the dearth of evidence in the legislative history. We understand that some courts have been willing to overlook this deficiency and rely on Congress's express finding that discrimination against the disabled is pervasive. *Dare v. California*, 191 F.3d 1167, 1174 (9th Cir. 1999), *petition for cert. filed*, 68 USLW 3566 (U.S. Feb. 24, 2000) (No. 99-1417); *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999); *Coolbaugh v. Louisiana*, 136 F.3d 430, 437 (5th Cir.), *cert. denied*, 525 U.S. 819 (1998). We disagree with this approach for several reasons. First, the Supreme Court in *Kimel* rejected the United States' reliance on

evidence of substantial age discrimination in the private sector and expressed skepticism as to whether such evidence could be extrapolated to the States. *Kimel*, 120 S. Ct. at 649. Second, the legislative history demonstrates that Title II, in significant part, was designed to achieve consistency between federally funded programs, already covered by the Rehabilitation Act of 1973, and other government programs. *See* S. Rep. No. 101-116, at 12 (1989), *reprinted in* 1 ADA Legislative History; H.R. Rep. No. 101-485, part 2, at 37 (1990), *reprinted in* 1 ADA Legislative History. This is not an objective compelled by the Constitution. Congress's desire to provide a "uniform remedy," placing States on the "same footing" as other entities governed by federal law, does not fall within its Fourteenth Amendment enforcement powers. *Florida Prepaid*, 119 S. Ct. at 2211. Third, the evidence of "discrimination" in the legislative history, like Congress's references to "discrimination" in its statutory findings, is not confined to *unconstitutional* discrimination; for the most part, the isolated evidence of "discrimination" fails to distinguish neutral laws and policies that adversely impact disabled individuals for benign, constitutional reasons from those specifically intended to disfavor disabled individuals. Congress's failure to recognize this distinction between unconstitutional and constitutional discrimination, and to incorporate it into the statute, leaves the accommodation remedy far out of proportion to any identified constitutional violation.

At best, "Congress appears to have enacted this legislation in response to a handful of instances of state ["discrimination" against the disabled] that do not necessarily violate the Constitution." *Id.* at 2210. Congress's remedial

authority does not extend so far. Neither the ADA's legislative history, nor Congress's "findings" embodied in the statute itself, responds to a "history of 'widespread and persisting deprivation of constitutional rights.' " *Id.* (quoting *City of Boerne*, 521 U.S. at 526).

We know that in holding that Congress exceeded its authority by abrogating States' sovereign immunity under the ADA, we depart from the view expressed by several of our sister circuits. *See Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999) (upholding Title I as applied to the States); *Muller*, 187 F.3d 298 (2d Cir. 1999) (same); *Kimel v. State Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (same), *aff'd on other grounds*, 120 S. Ct. 631 (2000); *Coolbaugh*, 136 F.3d 430 (5th Cir. 1998) (upholding Title II as applied to the States); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997) (same). *Cf. Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000) (holding that Congress exceeded its authority in applying Title II to the States); *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (*en banc*) (same); *Erickson*, 207 F.3d 945 (7th Cir. 2000) (striking Title I of the ADA as applied to the States). However, all but one of the circuits that have upheld application of the ADA to the States did so before the Supreme Court decided *Kimel*, a decision we believe "changes everything" and compels our holding today. The Second Circuit is the only circuit that has continued to apply the ADA to the States in the aftermath of *Kimel*, and it has done so without conducting any new analysis in light of that authority. *See Jackan v. New York State Dep't of Labor*, 205 F.3d 562 (2d Cir. 2000); *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77 (2d Cir. 2000). In addition, the Fifth Circuit recently acknowledged that *Kimel* may

undermine its holding in *Coolbaugh. Neinast v. Texas*, 217 F.3d 275, 280 n.29 (5th Cir. 2000).

In summary, we hold that Congress exceeded its enforcement authority under the Fourteenth Amendment in applying Title II to the States. Title II's strict prohibition on discrimination, along with the accommodation requirement, regulates far more conduct than the Equal Protection Clause prohibits. Moreover, the scarce evidence of unconstitutional discrimination by the States in the provision of public services leads us to conclude that Title II was "an unwarranted response to a perhaps inconsequential problem." *Kimel*, 120 S. Ct. at 648-49.

We do not mean to suggest that the problems endured by the disabled are inconsequential. To the contrary, we do not doubt that disabled individuals face considerable obstacles in today's society. There is no question that the ADA is an effective tool for achieving its laudable goals to ensure "equality of opportunity, full participation, independent living, and economic self-sufficiency" for disabled individuals. 42 U.S.C. § 12101(a)(8). But admirable, even desirable goals are not always consistent with constitutional limitations; in such cases, we are bound to follow the constraints of the Constitution.

3. *ADA Retaliation*

Unfortunately, a poorly drafted verdict form prevents us from resting our holding entirely on Title II of the ADA, although neither party has identified this fact. The general verdict form permitted the jury to award damages if it found that the defendants had violated Title II

"and/or" the ADA's retaliation provision. Since the verdict form makes it impossible for us to conclude that the award was based *solely* on Title II, we must consider whether a verdict under the ADA's retaliation provision can stand. We find that it cannot.

The ADA provides that "[n]o person shall discriminate against any individual because such individual . . . made a charge . . . or participated in any manner in an investigation . . . under this chapter." 42 U.S.C. § 12203(a). To establish a retaliation claim, a plaintiff must show: "(1) that he engaged in protected activity; (2) that he suffered adverse . . . action; and (3) that a causal connection existed between the protected activity and the adverse action." *Penny v. United Parcel Serv.*, 128 F.3d 408, 417 (6th Cir. 1997). Popovich's alleged "protected activity" was the complaint he filed with the DOJ. According to DOJ regulations, "[a]n individual who believes that he or she . . . has been subjected to discrimination on the basis of disability by a public entity may . . . file [such] a complaint." 28 C.F.R. § 35.170(a). Given our holding that the State of Ohio, including the DRD, is immune from suit for "discriminating" in violation of Title II, we hold that Popovich's complaint to the DOJ did not constitute a "protected activity." Therefore, we reverse the district court's judgment entering the jury's award of compensatory damages.

4. *Injunctive Relief*

In closing, we note that the district court did not specify its source of authority for imposing injunctive

relief. Thus, it is unclear whether the court was purporting to act under 42 U.S.C. § 1983 or the ADA. In either case, the injunctive relief cannot stand. The DRD was immune from suit under the ADA for the reasons discussed above, and it is not a "person" subject to suit under section 1983. *Mumford,* 105 F.3d at 267.

III.

For the reasons stated herein, we **REVERSE** the judgment of the district court and **REMAND** to the court with instructions that the jury verdict be **VACATED** and the injunction be dissolved.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOSEPH POPOVICH,	)	Case No. 1:95 CV 0684
Plaintiff,	)	MEMORANDUM OPINION AND ORDER (Docket No. 79)
vs.	)	
CUYAHOGA COUNTY, et al.,	)	
Defendants	)	Magistrate Judge James S. Gallas

(Filed Nov. 19, 1998)

Defendants have moved for new trial, judgment as a matter of law, and for remititur of the jury award pursuant to Rules 59 and 50(b) respectively of the Federal Rules of Civil Procedure. In this action the jury found both Cuyahoga County and the Cuyahoga County Court of Common Pleas Domestic Relations Division monetarily liable for violating Title II of the Americans with Disabilities Act of 1990 [ADA] and awarded compensatory damages against defendants in the amount of $400,000.00. Following jury trial, judgment was entered granting injunctive relief against both defendants under 42 U.S.C. §1983 for violation of plaintiff, Joseph M. Popovich's civil rights as alleged in the third count of the amended complaint which sought prospective relief.

A motion for new trial under Rule 59(a) must be denied, "if the verdict is one that reasonably could be reached, regardless of whether the trial judge might have reached a different conclusion were he the trier of fact." *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 796 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 41, 136 L.Ed.2d 375 (1996);

Wayne v. Village of Sebring, 36 F.3d 517, 525 (6th Cir. 1994), *cert. denied*, 514 U.S. 1127, 115 S.Ct. 2000, 131 L.Ed.2d 1001 (1995).

A motion for judgment as a matter of law or alternative motion for new trial under Rule 50(b)'s standard of review may vary depending on whether the matter before the district court is brought under diversity or as a federal question. In a diversity case, the defendant's Rule 50 motion is reviewed under the standards of review used by the courts of the state whose substantive law governs. *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 506 (6th Cir. 1998); *K&T Enterprises, Inc. v. Zurich Insurance Co.*, 97 F.3d 171, 176 (6th Cir. 1996). Since this case involved claims under the ADA and §1983 which are federal questions, the Sixth Circuit's standard of review governs which is as follows:

> In a federal question case, the standard of review for a Rule 50 motion based on sufficiency of the evidence is identical to that used by the district court. The evidence should not be weighed. The credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury. Instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant. *Wehr v. Ryan's Family Steak Houses, Inc.*, 49 F.3d 1150, 1152 (6th Cir. 1995).

K&T Enterprises, Inc., 97 F.3d at 175-76.

Reversal of judgment may only occur when no reasonable juror could find in favor of the nonmoving party. *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803, 806 (6th Cir. 1996); *Cook v. American Steamship Co.*, 53 F.3d 733, 740 (6th Cir. 1995). However, as with motions for new trial under Rule 59, the district court does not weigh the evidence, evaluate the credibility of the witnesses or substitute its judgment for that of the jury. *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 825 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 172, 139 L.Ed.2d 114 (1997). The court, rather, must weigh the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences. *Id.*[1]

Finally, a motion for remititur on the basis of the amount of the award will be denied "if the verdict is within the range of proof and the jury was properly instructed". *American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 424 (6th Cir. 1984).

I.

Defendants argue that the facts and circumstances of this case clearly involve the Domestic Relations Division of the Common Pleas Court but that the role of Cuyahoga County itself was never clearly established in plaintiff's case. As stipulated by the parties, both the State of Ohio

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[1] The party moving post-judgment for judgment as a matter of law must have previously moved for judgment as a matter of law before submission of the case to the jury. See Rule 50(a) and (b); *Libbey-Owens-Ford Co. v. Insurance Co. of North America*, 9 F.3d 422, 425 n. 2 & 3 (6th Cir. 1993) (further noting amendment of former motion for judgment n.o.v.).

and Cuyahoga County provide funding for the Cuyahoga County Common Pleas Court, Domestic Relations Division. However, defendants correctly maintain that in a discrimination case funding alone cannot be a basis for liability of a party.

A. Liability Under ADA Claims:

The evidence produced by plaintiff, Mr. Popovich, established that on August 24, 1992, a domestic violence petition under Ohio Rev. Code §3113.31 had been filed against plaintiff by his ex-wife, and the matter came for *ex parte* hearing on August 25, 1992. Mr. Popovich and counsel were present in the courtroom, but were not permitted to participate by order of Domestic Relations Division Judge Fisher. The *ex parte* proceeding on August 25, 1992 was followed by the judge's temporary protection order which awarded plaintiff's ex-wife temporary custody of the minor child of the plaintiff, Lauren Popovich, and further enjoined plaintiff and restrained him from approaching, entering or attempting to enter the child's school and/or daycare facilities and residence. Further pursuant to the statute §3113.31, Judge Fisher set the matter for hearing with Mr. Popovich's participation on September 3, 1992 before Referee Fuss. Meanwhile, pursuant to Judge Fisher's order, Mr. Popovich's daughter Lauren was removed from his home and he was prohibited from having any contact with her.

This domestic violence petition was one of two matters pending in the Common Pleas Court's Domestic Relations Division. Plaintiff had previously initiated a custody proceeding in the Domestic Relations Division

which had progressed to hearing on August 11, 1992 on cross-motions over custody and visitation rights involving his daughter. Plaintiff complained that he was having trouble hearing certain words and tones and could not participate actively in the proceedings.

Referee Fuss ordered the plaintiff to contact an outside agency regarding his hearing difficulty and plaintiff contacted the Cleveland Hearing and Speech Center. At the center, he was informed of the ADA and the court's obligation to provide auxiliary aids and services. An audiologist from the Center contacted Cuyahoga County's ADA court administrator, Richard Slosar, to attempt to obtain auxiliary aids and services for plaintiff. In turn, Mr. Slosar, on August 20, 1992, contacted Referee Fuss that an allegation of discrimination had been raised over the court's compliance with the ADA and the referee brought this to Judge Fisher's attention. On August 21, 1992, Referee Fuss announced that the custody proceedings would not go forward until the issue of ADA violations were resolved. Plaintiff was ordered to undergo an audiological examination at his own expense.

On August 25, 1992, the same day as the *ex parte* domestic violence petition hearing was conducted, a hearing in the custody matter was held concerning the audiological examination where the parties stipulated (without plaintiff's participation) that plaintiff had a hearing impairment that required "speech augmentation equipment". The audiologist had recommended an FM transmitter system with pass around microphone. Referee Fuss, however, decided to use an FM transmitter system with a centrally located microphone.

Two days later, on August 27, 1992, Judge Fisher declared a mistrial and voluntarily removed himself from the case "to preclude any impropriety, or the appearance of the conflict of interest" on his part. Referee Fuss was also removed from the case, and the case was transferred to Judge Flanagan for reassignment.

On September 3, until October 23, 1992, hearings were held on the domestic violence petition matter before Referee Schoby. These hearings continued the use of the FM system with a centrally located microphone and plaintiff used a headset. On October 23, 1992, plaintiff informed the referee that the extended use of the headset was causing an ear infection and it was no longer effective as a reasonable accommodation. Plaintiff requested a continuance of 10 days and attached to the motion for continuance was a copy of a letter from plaintiff's physician stating that plaintiff had been under doctor's care for an ear infection which was expected to improve in three to four weeks. The continuance was granted in the domestic violence petition case and the matter reset to December 1, 1992.

On November 2, 1992, Judge Flanagan issued an order regarding plaintiff's hearing disability. The order stated that the auxiliary aids and services were required in the ongoing proceedings and that the services were obtained through the Cleveland Hearing and Speech Center. The case was reassigned to Judge Gallagher.

On November 10, 1992, in the domestic violence petition matter, plaintiff moved for a decision for the return of his daughter to his custody, and for visitation rights.

On December 1, 1992, Plaintiff through counsel, informed the court that he was still experiencing hearing difficulties and that the centrally located microphone FM transmitter system used during the early proceedings was no longer able to accommodate his changing hearing condition. Further, plaintiff requested the court to immediately reconvene the custody hearing so that the plaintiff could see his daughter, and he requested the court provide him with computerized real time transcription of court proceedings or some other instantaneous transcription process. In response to this motion, Referee Schoby gave plaintiff two options. Plaintiff could either "withdraw his motion for a hearing accommodation and [the court] would proceed today with the continued hearing," or the referee could "schedule a hearing to determine the extent of his hearing disability and what, if any, accommodation needed to be made for that". Plaintiff, through counsel, informed the court that his hearing loss was so substantial he could not fully comprehend what was going on in a proceeding and he would rather proceed with the hearing on an appropriate accommodation. This hearing was scheduled for February 1, 1993.

On December 2, 1992, the Coordination and Review Section of the Department of Justice Civil Rights Division [CRS] notified the Domestic Relations Division that plaintiff had filed charges of discrimination and that an investigation had commenced. Plaintiff had contacted the Department of Justice around September 1992.

On January 25, 1993, the CRS made an inquiry to the Domestic Relations Division by telephone regarding the purpose of the February 1, 1993 accommodation hearing.

Subsequently, the hearing that had been scheduled was canceled.

On February 19, 1993, the CRS instructed the court to recommence the proceedings without delay and not to use the pending investigation as a reason to delay the resolution of this matter. On March 23, 1993, the CRS again instructed the court to resume proceedings and not to use the investigation as a reason to delay the custody proceedings. On May 28, 1993, the CRS sent a letter to the court requesting a response to plaintiff's allegations on June 30, 1993. The Domestic Relations Division responded in a letter to the CRS as follows:

> If [the plaintiff] wishes to bring a different type of auxiliary aid with him to court, at his own expense, he is certainly free to do so. However, the court has met its legal obligations with respect to reasonable accommodation, and is prepared today as it was last December to proceed with all matters pending before it with the system it provided in the September and October hearings, or with any other system which [the plaintiff] wished to provide.

On June 1, 1993 plaintiff's ex-wife filed a motion requesting that the court continue the *ex parte* order from August 25, 1992. The plaintiff's ex-wife indicated that "the current federal investigation has effectively stayed on-going proceedings". This matter had been transferred to the docket of Judge Anthony Russo after Judge Gallagher had been appointed to the position of administrative judge. On June 16, 1993, Judge Russo over plaintiff's objection, extended the *ex parte* order indefinitely. His journal entry read as follows:

> The Motion of the Plaintiff for Exetension (sic) of Temporary Protection Order, filed June 1, 1993, NO. 227320, be and is hereby GRANTED.

As a result, the full evidentiary hearing required by §3113.31, and which had been originally scheduled for September 1992, and the custody and domestic violence matters remained *in limbo* after December 1, 1992 when Popovich was given the option of either withdrawing his motion for hearing accommodation or proceeding with this case.

On March 31, 1994, the CRS informed the defendants that the court [sic] that an *ex parte* hearing or informal hearing could be held to determine the appropriate auxiliary aids, the nature of the plaintiff's disability and justifications for a different auxiliary aid. Judge Russo eventually scheduled a conference on August 1, 1994 to discuss the auxiliary aids. At this conference, plaintiff's counsel provided Judge Russo medical information and pamphlets regarding the current status of plaintiff's hearing deficiencies. The medical information reflected that the plaintiff had sloping mild to moderately severe hearing loss in both ears, and severe skin condition which seemed to be continuous into his ear canals.

On August 12, 1994, plaintiff's counsel wrote to Mr. Frank Pokorny, Court Administrator, with the name, address and phone number of a court reporting firm that had quoted him rates for real time transcription service and supplied those rates.

On September 12, 1994, the CRS wrote a letter to Mr. Patrick Murphy, Assistant Prosecuting Attorney for Cuyahoga County, requesting that the Domestic Relations

Division hold a conference no later than September 23, 1994 to set the date to resume the proceedings.

On October 7, 1994, the county prosecuting attorney responded to CRS, stating that Judge Russo had decided to order real time transcription service for the plaintiff, and that an attorneys' conference had been scheduled for October 13, 1994. On October 7, 1994, Judge Russo had in fact ordered real time transcriptions for plaintiff. However, the Domestic Relations Division never provided real time transcription for Mr. Popovich and never set a hearing for real time transcription to be used. At the conference, Judge Russo informed counsel that Referee Schoby would be unable to continue the case and counsel had the option to either proceed with a transcript prepared from prior proceedings and waive any appeal rights based on the use of the transcript, or begin the case anew. Plaintiff's counsel raised the issue of denial of access and contact with plaintiff's daughter since August 1992 pursuant to the *ex parte* temporary protection order. Subsequently, on October 13, 1994, Judge Russo ordered the guardian ad litem, "shall have authority, subject to objection which can be made to this court by proper motion, to arrange visitation between Lauren (minor child) and Joseph Popovich [and] same shall not be considered a violation of the temporary protection order previously issued by this court".

After this lawsuit was filed in March 1995 no further action was taken in either custody matter until more recently when Judge Cirigliano was appointed as visiting judge in early 1997. Upon being appointed, Judge Cirigliano held a brief hearing and brought the parties

together to resolve both the domestic violence and custody issues. Finally in December of 1997 plaintiff obtained custody of his daughter.

Plaintiff argues that Cuyahoga County Court of Common Pleas may be held liable for compensatory damages resulting from discrimination perpetrated against the plaintiff by the Domestic Relations Division and that the county which established and maintained the court system may be held liable for its failure to insure equal access to the services provided by the county including the court system.

From these facts the jury could not reasonably find that Cuyahoga County itself was responsible for discrimination or retaliation under Title II of the ADA. Although the CRS did communicate with Cuyahoga County primarily through its office of prosecuting attorney, the prosecuting attorney merely passed on the information from the CRS to the court. There is no evidence that the prosecuting attorney took an active role in this matter. The Domestic Relations Division made the decisions.

Plaintiff is incorrect in his contention that the county established the court system. The Cuyahoga County Court of Common Pleas was established pursuant to Article IV, §4 of the Ohio Constitution and is further governed by statutes as set forth by the state legislature of Ohio in Ohio Revised Code Chapters 2301 through 2337. It clearly was not established by the Cuyahoga County Commissioners.

Moreover, the county commissioners have limited discretion when it comes to maintaining a common pleas court, and must appropriate funds as required by state

law. The commissioners must provide appropriations for the physical facility of the Common Pleas Court. See Ohio Rev. Code §305.22, §307.01; *State ex. rel. Bittikofer v. Babst*, 97 Ohio St. 64, 15 Ohio Law Rep. 44, 119 N.E. 136 (1917). When it comes to operating expenses, "[a] court of common please in this state has the inherent authority to require funding which is reasonable and necessary to the administration of the court's business". *State ex. rel. Weaver v. Lake County Bd. Of Comm.*, 62 Ohio St.3d 204, 205, 580 N.E.2d 1090, 1092 (1991); and see *State ex. rel. Morley v. Lordi*, 72 Ohio St.3d 510, 511-12, 651 N.E. 2d 937, 939 (1995). Thus, the common pleas court is a state, not county, created entity which may mandate local county funding. Likewise, the commissioners have no authority over judicial salaries. These are set by the state legislature pursuant to Ohio Revised Code Chapter 141. The commissioners have no authority over the common pleas court's jurisdiction. The jurisdiction of the common pleas court is set by the Ohio Constitution and determined by the state legislature. Ohio Constitution Art. IV, §18; *State ex. rel. Stanton v. Powell*, 109 Ohio St. 383, 142 N.E. 401 (1924). Based on the foregoing law and the evidence submitted in the case, there is no legal nexus, nor could the jury reasonably find any factual nexus between the ADA violations and the county. Plaintiff has not shown that the county excluded or denied plaintiff of the benefits of services, programs or activities as required to prevail under 42 U.S.C. §12132.

On this point, plaintiff's reliance on *Livingston v. Guice*, 68 F.3d 460 (Table) 1995 WL 610355 (4th Cir. Oct. 18, 1995) is misplaced. Under arguably similar circumstances, the Fourth Circuit held that a North Carolina

Superior Court Judge was "the State's representative" based on facts that the State Superior Court was created by the State Constitution, held statewide jurisdiction, and had its judge's salaries determined by the state legislature. *Guice* fails to demonstrate any precedent for imposing liability on the county-level of local government.

Finally plaintiff contends that there is a nexus between the county and the actions of the Domestic Relations Division by way of the county's ADA coordinator. In support of this argument, plaintiff states that the ADA coordinator "informed Referee Gregory C. Fuss . . . that an allegation of discrimination had been raised relative to the court's compliance with the [ADA]" (Brief at 3). However, merely informing the court does not equate with exclusion or denial of benefits as required to prevail under §12132. The coordinator took no adverse action.

Consequently, there is no evidence supporting the jury's verdict against Cuyahoga County and judgment must accordingly be amended to reflect this pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

B. Liability Under 42 U.S.C. §1983:

Cuyahoga County admits that it may be held liable under 42 U.S.C. §1983 for violations of civil rights due to the acts or omissions of its policy-making officials if they establish policies or acquiesce in a custom or practice that deprived plaintiff of rights, privileges or immunities. See *Monnel v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 92 S.Ct. 2018, 56 L.Ed.2d 611 (1978). It argues that the jury was not presented instructions on the §1983 claim and plaintiff's failure to offer instructions on a

claim constitutes waiver of the claim citing *Knight v. Caldwell*, 970 F.2d 1430 (5th Cir. 1992), *cert. denied*, 507 U.S. 926 (1993).

It is remarkable that the county would raise such an argument. The amended complaint clearly provided that compensatory damages were being sought only under the ADA claims. The §1983 claim sought only prospective injunctive relief to compel the defendants to provide reasonable accommodation, to enjoin the defendants from engaging in further retaliation against plaintiff, and to compel the defendants to rule on the pending domestic relations cases. Since the matter sought injunctive relief it follows that this matter was not submitted to the jury. It was a matter to be tried to the bench. Apparently defendants do not understand this point, although they appeared to grasp the significance of the §1983 claim at trial. At the close of trial on April 6, 1998, the parties represented that a stipulated entry would be forthcoming. (See TR pg. 1-4, Docket No. 96). Both counsel for plaintiff and the defendants believed that the injunctive relief sought in the third count of the amended complaint was no longer an issue due to Judge Russo's order from October 1994 that the Domestic Relations Division would provide plaintiff with real time transcription services. This court suggested the parties prepare a stipulated entry as to that, and counsel agreed to submit the stipulated entry by April 15, 1998 (TR. pg. 4, Docket No. 96). Thus, there was no bench trial on this matter due to the mutual representation of agreed resolution in this final matter.

Evidently a proposed judgement entry was later sent in this matter addressed to the Magistrate Judge personally. Unfortunately this letter and proposed judgment entry did not reach the Magistrate Judge's attention and upon the court's inquiry to plaintiff's counsel, Mr. Haber, he submitted the proposed judgment entry which was signed and filed by the court on July 28, 1998. The entry is not stipulated, contrary to the earlier representations in open court. According to Mr. Haber he was unsuccessful in obtaining the stipulated entry from defendants' counsel, although defendants' counsel had earlier agreed to such.

With respect to the §1983 claim, there was no judgment on this claim when defendants filed their motion for new trial, judgment as a matter of law, and remititur. Copies of a prior judgment entry identical to the entry filed on July 28, 1998 were circulated to defendants and no objection to the proposed judgment entry with respect to plaintiff's claim for injunctive relief was made known to the court. Had the parties submitted their proposed judgment entry on or before April 15, 1998, as agreed, then at least the timing of defendants' motion filed on April 23, 1998 would have been sensible. However, notwithstanding the premature filing of the motion, no objections were anticipated because defendants had represented there could be no problem submitting an agreed proposed entry with respect to this claim and defendants remained silent until they filed a premature notice of appeal on August 27, 1998 (See Docket No. 97), rather than renewing the motion for new trial or judgment as a matter of law. Accordingly, since there was no judgment

entered on plaintiff's §1983 claim when the motion was filed, defendants' premature motion must be denied.

II.

Defendants further seek new trial or judgment as a matter of law based upon what they contend was a trial court error. Defendants mistakenly assert that, "This court early in the trial instructed the jury that the August 25, 1992 [temporary protection order] was properly granted". The fact is that after discussions with defendants' counsel the court did inform the jury on defendants' request to "admonish" the jury.

> Ladies and gentlemen of the jury, the Court will admonish you with respect to the *ex parte* hearing. It's a perfectly lawful procedure under the law of Ohio. That's all you're to consider. We will now proceed with the first witness. (TR. 114).

This issue carried some importance because in plaintiff's trial brief he maintained that the ADA was violated by the defendants' conduct including the evidentiary hearing on August 25, 1992 held without his participation or as he phrased it, "with the participation by opposing counsel." In relation to this argument, plaintiff claimed a violation of 28 C.F.R. §35.160 also. This matter was the topic of the court's order with respect to motions in limine (Docket No. 62). The court stated, "While these allegations constitute historical events that are part of this case, there is no basis for holding the position that the conducting of an evidentiary hearing on August 25, 1992 with participation of opposing counsel violates the Americans with Disabilities Act. Testimony concerning

the events that transpired on August 25, 1992, though, is admissible".

Defendants contend that the jury was improperly permitted to consider an award of damages for the time period "when a valid order of the Domestic Relations Court was in effect which limited plaintiff's contact with his daughter". (Motion for New Trial at 4). In effect, defendants argue that the jury should have been instructed not to consider the time period beginning August 25, 1992 to the time period when the temporary protection order expired. Defendants further requested an instruction that "the orders of the Domestic Relations Court should be deemed valid by the jury".[2] Defendants now for the first time contend that the review of state court decisions by a jury is improper citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

The *Rooker-Feldman* doctrine arose from two cases interpreting the language of 28 U.S.C. §1257 and its predecessor, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). "In each case, the Supreme Court considered whether a federal district court could exercise jurisdiction

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[2] Although the court ordered proposed instructions be submitted prior to trial, defendants had not requested an instruction on this point. Further, defendants misstated to the court that they suggested a special interrogatory to the jury on this point. (Transcript at 10-11, Docket No. 102). However, no such request had been made. See Defendants' Proposed Jury Instructions pg. 7, Docket No. 47).

to determine the validity of a state court judgment. The Supreme Court held that federal district courts 'do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional". *Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998); *and see United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995), *cert. dismissed*, 516 U.S. 983 (1995). Phrased another way, this doctrine bars "a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in United States District Court based on the losing party's claim that the state judgment itself violates the loser's federal rights . . . " *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 2654, 129 L.Ed.2d 775 (1994).

As recently explained in *Catz*, there are two prerequisites to this jurisdictional rule. First, "[i]n order for the *Rooker-Feldman* doctrine to apply to a claim presented in federal district court, the issue before the Court must be ['inextricably intertwined'] with a claim asserted in a state court proceeding". *Catz*, 142 F.3d at 293; *Keene Corp. v. Cass*, 908 F.2d 293, 296 (8th Cir. 1990).

Under the *Feldman* doctrine,

> the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive

> the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.
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> [*Keene Corp.*,] 908 F.2d at 296-97 (quoting *Penzoil* [sic] *Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring).

Catz, 142 F.3d at 293.

Second, the action must present a general challenge to state law as opposed to a "specific grievance". Consequently, in order to circumvent the *Rooker-Feldman* doctrine, the plaintiff must show that his claims were not intertwined with the state court judgment and further that he presented a "specific grievance" that the law was invalidly – even unconstitutionally – applied in the plaintiff's particular case".

There is no question that the state court judgment cannot be attacked either directly or collaterally in the federal district court. See *Smith v. Wayne Weinberger P.C.*, 994 F.Supp. 418 (E.D. N.Y. 1998). Plaintiff did not directly or collaterally challenge the state court decisions removing custody of his daughter. First, plaintiff was bringing claims which were not intertwined with the state court judgment. Plaintiff did not seek to reverse the temporary protection order issued by the Cuyahoga County Court of Common Pleas Domestic Relations Division. Second, plaintiff raised specific grievances of violations of the ADA. The rulings and judgment in a state court are not part of plaintiff's ADA claim. The temporary protection order made no reference to plaintiff's hearing difficulties and that order issued from an *ex parte* proceeding in which plaintiff did not participate. It is quite clear that

plaintiff's claims are based on the events that occurred subsequent to that temporary protection order, and that plaintiff had a "specific grievance" as to federal laws that were violated in the process. The *Rooker-Feldman* doctrine does not preclude federal review of plaintiff's ADA and §1983 claims. Consequently, there was no error in permitting the jury to consider award of damages during the period of time when the order of Domestic Relations Division was in effect which prohibited plaintiff's contact with his daughter.

Defendants also argue that the award should have been limited because after the order extending the temporary protection order, plaintiff appealed the decision to the Eighth district Court of Appeals for Cuyahoga County and to the Ohio Supreme Court which declined to hear the appeal in February 1994. The fundamental flaw in this argument is that once jurisdiction was returned to the Common Pleas Court Domestic Relations Division, the court in October 1994 ordered that it provide plaintiff with real time transcription services but declined to set the matter for hearing. Defendants argue that the Domestic Relations Division never had occasion to use real time transcription because the court and the parties were engaged in settlement negotiations. This, however, was a question of fact which the jury resolved against the defendants. The jury could reasonably find that plaintiff had been deprived of the custody of his daughter from August 1992 to December 1997 (absent brief periods of court-supervised visitation for several years) that arose from an *ex parte* order and proceeding which never was concluded due to plaintiff's request for accommodation

for his hearing impairment. The evidence certainly supports causation, contrary to defendants' arguments.

III.

Finally, defendants seek remititur [sic] of the jury award of damages maintaining that the damages of $400,000.00 were based upon passion and prejudice and expressed the jury's attempt to punish. Defendants contend that the damages do not reflect compensatory damages proven at trial and the size of the award is certainly a factor citing *Urseth v. City of Dayton*, 680 F.Supp. 1150, 1154 (S.D. Ohio 1987). The defendants believe the jury's determination of damages was "shocking" and manifested "plain injustice" so as to be grossly excessive as to be clearly erroneous citing *Neyer v. United States*, 845 F.2d 641 (6th Cir. 1988), and *In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988). The jury's award, though was much less than plaintiff had hoped to obtain.

As plaintiff points out, damages for pain and suffering for such a deprivation are difficult to determine. The jury awarded $400,000.00 to a man who it found was denied access to his daughter as a direct result of discriminatory acts of the Domestic Relations Division for a period of five years. Defendants substantiate no argument for a lesser award, other than their contention that this award was "shocking". If [the court] had been cast in the role of triers of fact [it] might well have determined that a lesser award was reasonable or fair, but [it] is not free to judge this award . . . in such a fashion". *Neyer*, 845 F.2d at 645.

CONCLUSION

Based upon the foregoing, defendants' motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure is denied. Defendants motion for a judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure is granted in part and denied in part. Judgment will be amended with respect to the ADA claims to exclude Cuyahoga County. And finally defendants' motion for remititur is denied.

IT IS SO ORDERED.

/s/ James S. Gallas
James S. Gallas
United States Magistrate
Judge

USCS Const. Amend. 14, § 1 (2002)

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

USCS Const. Amend. 14, § 5 (2002)

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

USCS Const. Amend. 11 (2002)

Suits against states – Restriction of judicial power.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.